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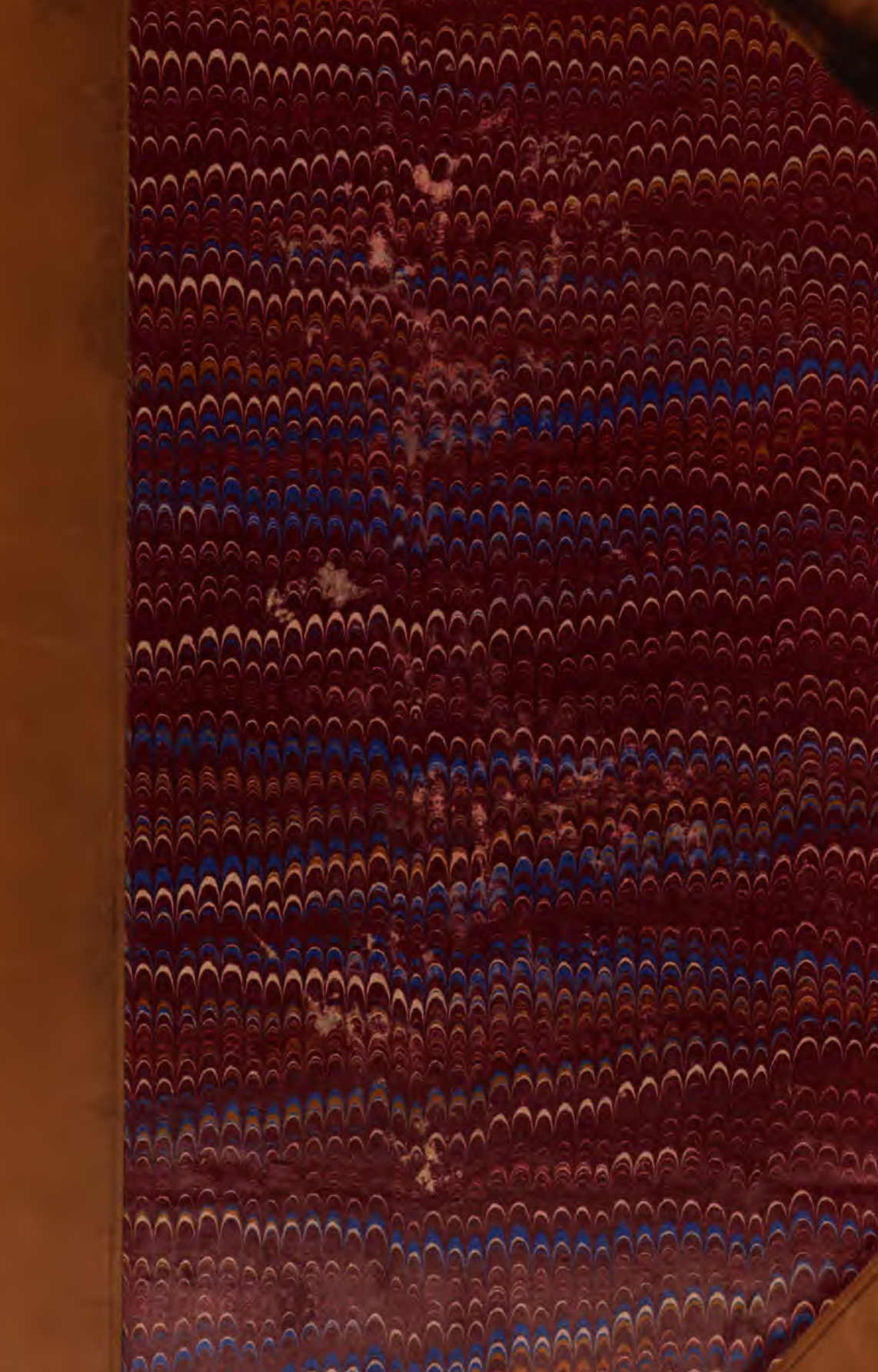
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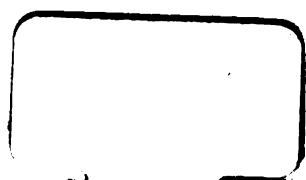
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# CANADIAN CRIMINAL CASES ANNOTATED.

A Series of Reports of Important Decisions in Criminal and Quasi-Criminal Cases in Canada under the Laws of the Dominion and of the Provinces thereof, with special reference to Decisions under the Criminal Code of Canada, 1892, in all the Provinces; with Annotations, a Table of Cases Cited and a Digest of the Principal Matters.

EDITED BY  
W. J. TREMEEAR,  
OF THE TORONTO BAR.

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VOL. I.

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TORONTO, CANADA,  
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## CORRIGENDA.

Page 31 line 29, for " 1893 " read " 1895."

Page 34 line 11, for " could procure " read " could not procure."

Page 126 line 25, for " Saint John " read " Fredericton."

Page 340 line 14, for " for " read " from."

Page 405 line 22, for " Division " read " Divisional."

Page 462 line 27, for "gilt" read "guilt."

Page 510 line 31, for " Cr. Code " read " that Act."

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## CASES REPORTED, VOL. I.

AUTHIER, R. v.,	(QUE.)	
<i>Trade Mark—Forgery of—Evidence—Cr. Code 448.</i>		68
BALLARD, R. v.,	(ONT.)	
<i>Election to be tried by jury—Re-election—Mandamus to Sheriff to bring the Prisoner before County Judge.—Cr. Code 766, 767.</i>		96
BANKS, R. v.,	(N.W.T.)	
<i>Municipal by-law—Proof of—Transient traders—Conviction—Costs of quashing.</i>		370
BIGAMY, SECTIONS OF CODE, RE,	(CAN.)	
<i>Bigamy—Married person leaving Canada with intent to go through a form of marriage elsewhere—Extra-territorial offence—Jurisdiction—British or Canadian Parliament—Cr. Code 275, 276.</i>		172
BISHOP, EX PARTE,	(N.B.)	
<i>Convictions for two offences—Imprisonment—Time—Not concurrent unless stated.</i>		118
BLYTHE, R. v.,	(B.C.)	
<i>Abduction—Father's possession necessary at time of taking—De facto possession—Prior abandonment by daughter—Letters as acts of persuasion—Extra-territorial inducement to leave—Cr. Code 283.</i>		263
BUCHANAN, R. v.,	(MAN.)	
<i>Indictment—Irregularity—Failure of foreman of Grand Jury to initial names of witnesses—"Shall," meaning of—Assault—Consent to fight—Cr. Code 645.</i>		442
BURKE, R. v.,	(N.S.)	
<i>County Judge's Criminal Court—Powers as of a Superior Court—No Review on Habeas Corpus—Irregularity in Warrant of Commitment.</i>		539
CAMERON, (H. B.), R. v.,	(QUE.)	
<i>Habeas Corpus Act (Que.)—Bail as constructive imprisonment—Felony or misdemeanor prior to Criminal Code—Effect of Cr. Code, 535.</i>		169

- CAVELIER, R. v., (MAN.)  
*Judicial proceedings on Sunday—Invalidity—Committal by Magistrate for trial—Cr. Code 564, 729.* 134
- CHIPMAN, R. v., (B.C.)  
*Municipal law—Offence charged against Police Magistrate—Jurisdiction of other Justices over—Summons improper for inconvenient place of return.* 81
- CIARLO, R. v., (QUE.)  
*Witness—Former deposition—Admissibility to contradict testimony—Irregularity in—Duty of Coroner—Translation of evidence as given—Effect of.* 157
- COLLINS, R. v., (N.B.)  
*Demand—Menaces—Misdirection.* 48
- CONLIN, R. v., (ONT.)  
*Theft—Power of police magistrate—Extended jurisdiction on trial with consent—Cr. Code 344, 783, 785.* 41
- CONNOLLY, R. v., (ONT.)  
*Conspiracy—Evidence to prove—Overt act of one conspirator as evidence against all—Venue—Jurisdiction—Acts partly extra-territorial—Right of reply on joint indictment—Cr. Code 743.* 468
- CORBY, R. v., (N.S.)  
*Failure of Prisoner's Wife to testify—Comment by Prosecuting Counsel—New Trial—Canada Evidence Act, s. 4 (2).* 457
- COREY, R. v., (N.B.)  
*Counterfeit tokens—Offence of selling—"Counterfeit" defined—Cr. Code 479.* 161
- COULSON, EX PARTE, (N.B.)  
*Certiorari—Review of findings—Intoxicating liquors—Sale by club.* 31
- COULSON, R. v., (ONT.)  
*Conviction—Uncertainty in—Amendment—Practising Medicine—Meaning of—Ontario Medical Act—Certiorari—Costs.* 114
- CREECH, R. v., (B.C.)  
*Murder—Attempt to procure abortion—Evidence of cause of death—Sufficiency of—Insufficient post-mortem examination.* 246

- CURRY, EX PARTE,** (QUE.)  
*De facto judge—Failure to take oath of office and oath of allegiance—Necessity of objection by prisoner—Validity of adjudication in criminal matter.* 532
- DAVIDSON, R. v.,** (N.S.)  
*Evidence—Dying declaration—Belief of impending death—Subsequent hope of recovery—Irrelevancy of.* 351
- DEFRIES, R. v.,** (ONT.)  
*Conspiracy—Object of—Civil wrong—Habeas Corpus—Controverting Return—Jurisdiction—Cr. Code 394, 752.* 207
- DIAS, R. v.,** (N.B.)  
*Liquor License Law—Sale to Interdicted Person after Notice—Want of knowledge by vendor of Identity immaterial.* 53
- DOHERTY, EX PARTE,** (N.B.)  
*Information—Amendment in absence of accused—Distinct offence—Jurisdiction—Cr. Code 853.* 84
- DOUGLAS, R. v.,** (MAN.)  
*Evidence—Admissibility—Former deposition of accused—Canada Evidence Act, secs. 2 and 5—Identity—Proof of.* 221
- EGAN, R. v.,** (MAN.)  
*Summary Trial with Consent—Conviction—No Right of Appeal—Cr. Code, 783 (a), 808.* 112
- EMMERSON, EX PARTE,** (N.B.)  
*Certiorari—Copy of Proceedings below—Practice.* 156
- FITZGERALD, R. v.,** (ONT.)  
*Quashing conviction—Status of prosecutor—No lapse on death of informant—Appeal to Sessions—Cr. Code 880.* 420
- FRANCE, R. v.,** (QUE.)  
*Information—Common gaming house—Disorderly house—Jurisdiction of Judge of the Sessions of the Peace—Associated words—Rule of interpretation—Cr. Code 196, 198, 783 (f).* 321
- FRAWLEY, R. v.,** (ONT.)  
*Conspiracy—Proof of—Single indictment against one conspirator—Cr. Code 64, 394.* 253
- GARROW, R. v.,** (B.C.)  
*Manslaughter—Attempt to procure abortion—Evidence of cause of death—Sufficiency of—Insufficient post-mortem examination.* 246



- GAVIN, R. v., (N.S.)  
*Conviction — "Penalty"—Meaning of—No amendment where possibly greater than authorized—Cr. Code 872.* 59
- GIBBONS, R. v., (MAN.)  
*Menaces—Demand with menaces and with intent to steal —Threat of prosecution under Liquor License Law—Cr. Code 404.* 340
- GILLESPIE, R. v., (QUE.)  
*Trading company—False statement of affairs by director —Locality of crime—Place of mailing or place of receipt of letter—Continuing offence—Concurrent jurisdiction in two provinces—Company law of another province—Canada Evidence Act sec. 7—Status of president as director—Habeas corpus after committal for trial—Duty of judge upon—Cr. Code 365, 553 (b), 554 (b).* 551
- GRAHAM, R. v., (ONT.)  
*Certiorari in Criminal Matter—Interlocutory Order—Appeal from—Application of Cr. Code, Secs. 897, 898—"Weekly Court" in Ontario—Jurisdiction.* 405
- GRENIER, R. v., (QUE.)  
*Criminal libel—Plea of justification—Requisites of—Irregularity.* 55
- HALIFAX ELECTRIC TRAMWAY CO., R. v., (N.S.)  
*Sunday observance—Provincial Criminal law before confederation of the provinces—Ultra vires amendments —British North America Act.* 424
- HAMMOND, R. v., (ONT.)  
*Former deposition of accused—Admissibility—Coroner's Inquest—Canada Evidence Act—Intrinsinating questions —Proof of motive—Res gestæ.* 373
- HARDIGAN v. GRAHAM, (QUE.)  
*Aggravated Assault—Civil Action Barred by Conviction —Cr. Code 262, 783 (c), 864, 866* 437
- HERRELL, R. v., (MAN.)  
*Liquor License—Evidence—Proof of Prior Conviction—Evidence of Identity of Convicted Party—Disqualification of Magistrate—Bias or Interest—Conviction —Amendment—Cr. Code 889, 890.* 510

- HOWARTH, R. v., (ONT.)  
*Ontario Medical Act—Druggist—Practicing Medicine.* 14
- HOWARTH (S.), R. v., (ONT.)  
*Trade Mark—Falsely Applying—Proprietor's Assent—  
 Onus of Proof—Cr. Code 446, 447, 710.* 243
- LAPIERRE, R. v., (QUE.)  
*Attempt to commit murder—Cruelty to child—Evidence—  
 Cross-examination on irrelevant question—No rebuttal of  
 answer to impeach credit—Indictment—Multifariousness  
 —Abandonment of part—Cr. Code 210, 215, 232, 611.* 413
- LAWRENCE, R. v., (B.C.)  
*Speedy trial—Right to elect for—Bail—Effect of—Waiver  
 by plea in jury court—Cr. Code 596, 601, 765.* 295
- LE BLANC, EX PARTE, (N.B.)  
*Second offence—Time as regards information for first  
 offence.* 12
- LEVI, RE, (QUE.)  
*Extradition—Ashburton Treaty—Evidence on habeas  
 corpus—Identity of prisoner.* 74
- LON KAI LONG, EX PARTE, (QUE.)  
*Commitment—Unauthorized conditions of discharge—  
 Quashing warrant—Laundry license by-law.* 120
- MCCOY, EX PARTE, (N.B.)  
*Magistrate—Bias—Pecuniary interest—Fixed appropri-  
 ation out of fines additional to salary—Canada Temper-  
 ance Act—Keeping liquor for sale—Evidence of pro-  
 prietary interest.* 410
- MCGREEVY, R. v., (ONT.)  
*Conspiracy—Evidence to prove—Overt act of one con-  
 spirator as evidence against all—Venue—Jurisdiction—  
 Acts partly extra-territorial—Right of reply on joint  
 indictment—Cr. Code 743.* 468
- MCLEOD, R. v., (N.S.)  
*Certiorari—Quashing Conviction—Costs where not  
 opposed.* 10
- MAINVILLE, EX PARTE, (QUE.)  
*De facto Judge—Jurisdiction—Failure to take Oath of  
 Allegiance and Oath of Office—Objection by Accused.* 528

- MINES, R. v., (ONT.)  
*Magistrate—Preliminary enquiry—Substituted charge after conclusion of—Conviction—Habeas Corpus—Invalid return—Cr. Code 108.* 217
- MURRAY, R. v., (ONT.)  
*Dies non—Preliminary inquiry held on a statutory holiday—County Judge's Criminal Court a court of record—Review by writ of error.* 452
- NEVILLS v. BALLARD, (ONT.)  
*Assault occasioning bodily harm—Civil action not barred by conviction—Cr. Code 262, 864, 866.* 434
- NEW GLASGOW, RE, (N.S.)  
*Certiorari—Non-judicial acts not reviewable.* 22
- NUGENT, EX PARTE, (N.B.)  
*Conviction—Unauthorized penalty added—Amendment—Review of finding—Discretion to allow certiorari—Alternative right of appeal.* 126
- O'NEIL v. ATTORNEY-GENERAL, (CAN.)  
*Gaming-house—Confiscation of money found in—Power of Deputy High Constable as a deputy chief constable—"Persona designata"—Officer de facto—Collateral attack—Cr. Code 575.* 303
- PEARSON, R. v., (B.C.)  
*Municipal trade license—"Wholesale trader" defined.* 337
- PETERSKY, R. v., (B.C.)  
*Municipal laws—By-law—Unreasonableness—Conviction—Whether distress necessary before commitment—Sunday observance.* 91
- PLUNKETT, RE, (B.C.)  
*Certiorari—Application for—Six days' notice to justices—Substitution of fresh warrant of commitment.* 365
- QUEEN (THE) v. (Indexed under name of defendant.)
- REED, R. v., (B.C.)  
*Appeal from two justices in British Columbia—Summary trial without consent—Cr. Code 782, (a 5), 784 (3).* 231
- REGINA v. (Indexed under name of defendant.)
- REHE, R. v., (QUE.)  
*Prostitution—Meaning of—Indiscriminate lewdness—Cr. Code 207 (1).* 63

- ROBINSON, R. v., (ONT.)  
*Husband and wife—Failure to provide necessities—  
 “Lawful excuse”—Cr. Code 210.* 28
- ROSS, EX PARTE, (N.B.)  
*Certiorari instead of appeal—Alternative remedy—Discretion—Exceptional circumstances.* 153
- ST. LOUIS, R. v., (QUE.)  
*Costs after recognisance to prosecute—Taxation and scale of—Commissioner of Dominion Police—Personal or representative capacity as informant—Liability for costs—Cr. Code 595, 835.* 141
- SAUER, R. v., (B.C.)  
*Liquor License—Exception allowing supply of liquor to guests with their meals—“Meals” defined—Device intended to evade statute.* 317
- SHEEHAN, R. v., (QUE.)  
*Mixed jury—Constitutional right to claim in Quebec—Re-election in favour of ordinary jury—Mixed jury a matter of procedure, not of organisation of Court—Cr. Code 670.* 402
- SOMERS, R. v., (ONT.)  
*Conviction—Uncertainty in—Costs of quashing—Practice.* 46
- STAFFORD, R. v., (N.S.)  
*Bawdy house—Offence of keeping—Imprisonment for non-payment of fine—Limitations of Cr. Code 208, 788, 872 (b).* 239
- STERNAMAN, R. v., (ONT.)  
*Poisoning—Intent—Proof of—New Trial—Cr. Code 748.* 1
- STRAUSS, R. v., (B.C.)  
*Statute creating offence—Exemption from—Proviso or exception—Negativing—Game Protection Act (B.C.) 1895.* 103
- TAMBLYN, R. v., (ONT.)  
*Conspiracy—Object of—Civil wrong—Habeas corpus—Controverting Return—Jurisdiction—Cr. Code 394, 752.* 207

- WALSH, R. v., (ONT.)  
*Construction of statute—"Sale or other disposal"—*  
*Liquor License Act (Ontario).* 109
- WETTMAN, R. v., (ONT.)  
*Gaming house—Offence of keeping—Locality of crime*  
*—Acts partly in foreign jurisdiction—Cr. Code 196,*  
*198.* 287
- WILSON, R. v., (N.W.T.)  
*Jurisdiction—Liquor License (N.W.T.) Ordinance—*  
*Two Justices—Cr. Code, 842.* 132
- WIRTH, R. v., (B.C.)  
*Appeal from two justices in British Columbia—Sum-*  
*mary trial without consent—Cr. Code 782, (a 5),*  
*784 (3).* 231
- WYSE, R. v., (N.W.T.)  
*Seduction—Evidence—Corroboration—Cr. Code 684.* 6



## CASES CITED, VOL. I.

- Aberdare Canal Co., R. v., 23, 26  
 Agar-Ellis, Re, 273  
 Ahearne, R. v., 255  
 Allan, R. v., 512  
 Allcock, R. v., 512  
 Allen v. Flood, 215, 261  
 Allinson v. General Council, 411  
 Anderson v. Anderson, 110  
 Andrews v. The People, 443, 445  
 Angelo v. People, 459, 460, 465  
 Apothecaries Co. v. Greenough, 15  
 Apothecaries Co. v. Jones, 22, 116  
 Apothecaries Co. v. Lotinga, 15  
 Apothecaries Co. v. Nottingham, 15,  
     16, 19, 116  
 Armitage, R. v., 423  
 Armstrong v. McCaffery, 542  
 Arscott v. Lilley, 220  
 Asher v. Douglas, 221  
 Ashton, R. v., 363  
 Attorney-General v. Bertrand, 465  
 Attorney-General v. Temple, 152  
 Attwood, R. v., 162, 166, 168  
 Austin, Ex p., 219  
 Austin v. People, 461  
 Austin, R. v., 31  
 Australian Wine Importers, Re, 245  
 Authier, R. v., 245, 246  
 Baker, R. v., 362  
 Bailey, Re, 138.  
 Bank of Hamiton v. Isaacs, 479  
 Barford, Ex p., 273, 277  
 Barker, R. v., 219  
 Basingstoke (Inhab. of), R. v., 368  
 Bates, R. v., 265  
 Baxter v. The People, 140, 454  
 Beaver, R. v., 443  
 Bedford Level, R. v., 311, 314  
 Beemer, R. v., 235, 237, 238  
 Beigel's Application, Re, 70  
 Bellencontre, Re, 80  
 Bennett, R. v., 87  
 Berryman v. Wise, 315  
 Bertrand, R. v., 459, 463, 465  
 Best, R. v., 259, 505, 507, 508  
 Bishop, R. v., 538  
 Black, R. v., 130  
 Blake v. Albion Life, 479, 500  
 Blake, R. v., 479, 491, 492  
 Blakeley, R. v., 94  
 Booth, R. v., 280  
 Boscovitz, R. v., 105, 106  
 Boucher, Re, 236, 238  
 Bowerman, R. v., 223  
 Bowes, R. v., 479, 491, 505, 507  
 Bowyer v. Percy Supper Club, 31  
 Brackenbury, R. v., 401  
 Bradlaugh, Ex parte, 155  
 Brady, R. v., 130, 132  
 Bradshaw v. People, 461  
 Bradshaw, R. v., 451  
 Bram v. United States, 400  
 Brashier v. Jackson, 91  
 Brazell v. State, 467  
 Brennan's Case, 544, 548, 549  
 Brierly, R. v., 174, 194, 200  
 Brisac, R. v., 479, 491, 503, 505, 507  
 Brisbois v. The Queen, 456  
 Britton, R. v., 378  
 Brown v. Commonwealth, 231  
 Brown v. Lunt, 311  
 Brown, R. v., 13, 514, 520  
 Bryan, R. v., 106  
 Budway, R. v., 47, 48  
 Bullard, R. v., 443  
 Bulwer's Case, 508  
 Burdett, R. v., 286, 506  
 Burgess, R. v., 156  
 Burke's Case, 550  
 Burke, R. v., 98, 299, 300, 301, 548  
 Burton, R. v., 252, 412  
 Buttle, R. v., 223, 376

- Caesar, Re, 23  
 Calkin v. State, 462  
 Cameron, Re assessment of, 24  
 Cameron (H.B.) R. v., 302  
 Campbell v. Prince, 479  
 Carew Estate, Re, 477  
 Carpenter v. People, 68  
 Carver v. United States, 363, 364  
 Casgrain v. Leblanc, 305  
 Cavalier, R. v., 455  
 Chambers, R. v., 50  
 Chancy v. Payne, 219  
 Chapman, R. v., 511  
 Chapman v. State, 454  
 Charcoa, R. v., 399, 401  
 Charles, R. v., 31  
 Charnock, R. v., 262, 486  
 Charter v. Graeme, 105, 219  
 Cherry, R. v., 223, 381  
 Chidley, R. v., 478  
 Christie v. Unwin, 542  
 Clace, R. v., 156  
 Clark, R. v., 13  
 Clark v. Reg., 22  
 Clarke, Re, 139, 140  
 Clawson v. State of Ohio, 477  
 Cleland, Re, 339  
 Closs, R. v., 73  
 Commonwealth v. Bond, 162  
 Commonwealth v. Cooper, 364  
 Commonwealth v. Coombs, 23  
 Commonwealth v. Cook, 68  
 Commonwealth v. Edwards, 444, 446  
 Commonwealth v. Eurig, 31  
 Commonwealth v. Harlaw, 459, 465  
 Commonwealth v. Hayes, 231  
 Commonwealth v. McClean, 492  
 Commonwealth v. Morse, 162  
 Commonwealth v. Pomphret, 31  
 Commonwealth v. Prius, 215  
 Commonwealth v. Ryan, 31  
 Commonwealth v. Scott, 231, 459, 465  
 Commonwealth v. Worcester, 459, 461, 465  
 Coles, R. v., 23  
 Colmer, R. v., 477  
 Colonial Bank v. Willan, 155  
 Confederation Life v. O'Donnell, 479  
 Connolly, R. v., 225, 255, 258, 262  
 Connor v. State, 285  
 Conway, Ex parte, 130, 131, 132  
 Conway and Lynch, R. v., 139  
 Cooke, R. v., 255, 261, 286  
 Cooper, Re, 136, 139  
 Coote, R. v., 223, 224, 225, 227, 376, 379, 394, 477, 479, 487, 501  
 Corey, R. v., 444, 446, 450  
 Cope, R. v., 479, 485  
 Corbett v. Haigh, 111  
 Corby, R. v., 533  
 Cornfield, R. v., 287  
 Cornwall v. The Queen, 103  
 Cotton, R. v., 2  
 Coulson, R. v., 15, 22, 118, 411, 512, 527  
 Counselman v. Hitchcock, 383  
 Coutts, R. v., 372  
 Crabbe, R. v., 547  
 Crandall, R. v., 95  
 Crockett, R. v., 352, 357  
 Cross v. Watts, 511  
 Cross, Ex p., 366  
 Cundy v. Le Cocq, 537, 538  
 Cuthbert, R. v., 94  
 Daley, Ex parte, 31, 35  
 Daniels v. Municipal Council, 23  
 Davies v. Macuna, 15  
 Davis, R. v., 477  
 Dawson v. State, 466, 467  
 Day, R. v., 399  
 Deal (Mayor of), R. v., 412  
 Defries, R. v., 262, 509  
 Denby, R. v., 443  
 Dewar, R. v., 130, 131  
 Dicker v. Angerstein, 167  
 Dickinson, R. v., 443, 444  
 Donelly, Re, 48, 117  
 Douglas, R. v., 137, 401  
 Driscoll, Ex p., 412

- Dublin, R. v., 525  
 Duffield, R. v., 477, 479  
 Dugan, Ex parte, 13, 512, 521  
 Duquette, R. v., 111  
 Edelman & Vick, Re, 72  
 Edmonds, R. v., 12  
 East London, R. v., 112  
 Eggington's Case, 138  
 Elrington, R. v., 441  
 Emerson v. Niagara Nav. Co., 436  
 Erdheim, R. v., 376, 382  
 Esdaile, R. v., 477  
 Evans v. Hemmingway, 40  
 Faderman, R. v., 456  
 Fallows v. Taylor, 316  
 Farina v. Silverlock, 72  
 Farrant, R. v., 512, 525  
 Fee, R. v., 487  
 Fellowes, R. v., 262, 481, 490  
 Ferguson (D.C.) Re 543, 544, 546, 549  
 Fernandez, Re, 377  
 Fielding v. Thomas, 175  
 Firth, Re, 479  
 Fisher v. Ronalds, 379  
 Fitchburg Ry. v. Grand Junction Ry., 314  
 Flannagan, R. v., 2  
 Fleming v. Clarke, 544  
 Flick v. Brisbin, 435, 436, 437  
 Foley v. Fletcher, 234  
 Folson, R. v., 536  
 Ford v. Elliott, 479, 492  
 Foster, R. v., 542  
 Foulkes, Ex parte, 119  
 Frawley, R. v., 509  
 Freegard v. Barnes, 313  
 French, R. v., 111  
 Gallagher (Hannah), Ex p., 412  
 Gallagher (Thomas), Ex p., 412  
 Gallagher, R. v., 479  
 Garbett, R. v., 376, 379, 397, 487  
 Garbutt, Re, 81  
 Gardner, R. v., 54  
 Garner v. Coleman, 374  
 Garner, R. v., 2  
 Garnet v. Ferrand, 395  
 Gavin, R. v., 401, 527  
 Geering, R. v., 2, 3, 5  
 Gerrans, R. v., 443  
 Gibbs, Ex p., 339  
 Gibson, R. v., 456, 479  
 Gill, R. v., 216, 262  
 Glamorgan (Justices of), R. v., 366  
 Goddard, R. v., 353  
 Goff's Case, 542  
 Goldshede, R. v., 478  
 Goodall v. State, 364  
 Goodfellow, R. v., 443  
 Goodman, R. v., 456, 543  
 Gordon's Case, 315  
 Gordon, R. v., 443  
 Gorman, Ex p., 412  
 Gosset v. Howard, 542  
 Gourlay, R. v., 541  
 Grady, R. v., 161  
 Graff v. Evans, 32, 36, 40  
 Grannis, R. v., 513  
 Gray, R. v., 2  
 Great Northern Committee v. Inett, 236, 237  
 Green and Bates, R. v., 272  
 Groenvelt's Case, 542  
 Hall, R. v., 15, 16, 116  
 Hamilton, R. v., 53  
 Hammond, R. v., 229, 491  
 Hamp, R. v., 216  
 Hanson v. Shackelton, 140  
 Hardy's Trial Case, 477  
 Harrison v. Smith, 453  
 Hartley, R. v., 130, 132  
 Hawke v. Dunn, 112  
 Haworth (Wm.), R. v., 479  
 Hayes, R. v., 489  
 Hazell, R. v., 349  
 Hazen, R. v., 117  
 Heaney v. Birch, 339  
 Heffer v. Martyn, 477  
 Heesom, R. v., 2, 3, 5  
 Henderson v. People, 68

- Hendershott, R. v., 223, 225, 229, 375, 377, 382, 385, 391, 395  
 Henderson v. Preston, 119  
 Henderson v. Sherborne, 233  
 Henkers, R. v., 283  
 Herefordshire, R. v., 511  
 Herford, R. v., 386, 395  
 Hermann, R. v., 162  
 Hessin, R. v., 15  
 Hibbert, R. v., 265  
 Higham, R. v., 132  
 Hill v. State, 364  
 Hodge v. The Queen, 174, 200  
 Hodge v. State, 140  
 Hodgins, R. v., 110  
 Holden, R. v., 136  
 Holden v. King, 436  
 Holmes, R. v., 286  
 Horton, Re, 116  
 Horton, R. v., 241  
 Howard v. Bodington, 447  
 Howell, R. v., 363  
 Hubbard, R. v., 353, 361, 365  
 Hudson, R. v., 215  
 Huggins, R. v., 411, 512  
 Hunt v. De Blaquière, 29  
 Hunt v. McArthur, 136  
 Hunt, R. v., 479  
 Inhabitants of Basingstoke, R. v., 368  
 Inhabitants of Oxford, R. v., 256  
 Iowa News Co. v. Harris, 27  
 Jackson v. Commonwealth, 284  
 Jameson, R. v., 198  
 Jefferys v. Boosey, 178, 196, 284  
 Jenkins, R. v., 353  
 Jenks v. Turpin, 291, 292, 293  
 Jessop v. Brierley, 423  
 Johnson v. Orr Ewing, 72  
 Johnson, R. v., 300, 301, 507  
 Johnston, R. v., 47  
 Jones, Ex p., 511  
 Jones' Case, 167  
 Jones v. Johnson, 140  
 Jones v. North, 477  
 Jones, R. v., 162, 315, 341  
 Jordan, R. v., 489  
 Jukes, R. v., 154  
 Justices of Dublin, R. v., 513, 518  
 Justices of Glamorgan, R. v., 366  
 Justices of Huntingdon, R. v., 513  
 Justices of Leicestershire, R. v., 421  
 Justices of London, R. v., 113  
 Justices of Somersetshire, R. v., 140  
 Justices of Surrey, R. v., 24  
 Kennedy, R. v., 512  
 Kenrick, R. v., 216, 262  
 Kenworthy v. Peppiat, 453  
 Keyn, R. v., 174  
 Kielley v. Carson, 200  
 Kier v. Leeman, 316  
 Kinnersley, R. v., 256, 260  
 Kipps, R. v., 266, 268, 269, 276  
 Kitchen v. Shaw, 112  
 Klemp, R. v., 512, 525  
 Kyle, Ex p., 23, 24  
 La Banque Jacques Cartier v. Gagnon, 381  
 Lake, R. v., 130  
 Lamb v. Munster, 379  
 Lampe v. Manning, 454  
 Larkin's Case, 377  
 Laughy, Ex p., 511  
 Lavin, R. v., 220  
 Law, R. v., 236  
 Leather Cloth Co. v. American Leather Cloth Co., 70  
 Le Blanc, R. v., 476  
 Leeson v. General Council, 515, 519, 524, 525  
 Levy v. Moylan, 542  
 Leicestershire (Justices of), R. v., 421  
 Lindsay v. Leigh, 366  
 Lloyd (Geo.), R. v., 522  
 Logan v. United States, 477  
 London (Justices of), R. v., 113  
 Long v. State, 459, 460, 465  
 Lord, Ex p., 236  
 Luttrell v. State, 477

- Lynch, R. v., 139  
 Lyon, R. v., 350  
 Mackalley's Case, 139  
 Macleod v. New South Wales, 174,  
     178, 181, 182, 192, 195, 284  
 Madden, R. v., 223, 225, 229, 385,  
     389, 391, 392  
 Mainville (Eliza), Re, 532  
 Major, R. v., 412  
 Makin v. New South Wales, 2, 3, 4  
 Male, R. v. 401  
 Manchester and Leeds Ry., R. v.,  
     156  
 Mankletow, R. v., 265, 266, 270, 276,  
     279, 280  
 Manning, R. v., 255, 258  
 Marchessault v. Gregoire, 436  
 Margate Pier v. Hannam, 311, 315  
 Marks & Tellefsen's Application, 69  
 Marshall v. Broadhurst, 339  
 Massey v. Johnson, 366  
 Mayor of Deal, R. v., 412, 518  
 McAllan, R. v., 368  
 McAuley, R. v., 235, 237  
 McCammon v. McGreevy, 484  
 McCoy, Ex p., 527  
 McDonald, R. v., 341, 345, 347, 348,  
     399  
 McGrath, R. v., 349  
 McKenna's Case, 477  
 McQuiggan, R. v., 195  
 Mead, R. v., 362  
 Melchers v. De Kuyper, Re, 245,  
     246  
 Mendon v. Worcester, 23  
 Merceron, R. v., 397, 478  
 Metcalf v. Bouck, 477  
 Mews v. The Queen, 300  
 Miard, R. v., 51  
 Michaud, Ex p., 412  
 Miles, R. v., 436  
 Miller, R. v., 223, 283  
 Mill's Estate, Re, 372  
 Mines, R. v., 527  
 Minton's Case, 363  
 Mogul Steamship Co. v. McGregor,  
     477  
 Moncton (Town of) v. Hebert, 412  
 Mondelet, R. v., 283  
 Morant v. Taylor, 112  
 Morin v. The Queen, 456  
 Morby, R. v., 251  
 Morley, R. v., 155  
 Morrison v. Manley, 453  
 Mostyn v. Fabrigas, 272, 276, 278  
 Mulcahy v. The Queen, 254, 255, 259,  
     262, 484, 491, 507  
 Mullins v. Surrey, 300, 302  
 Munro, R. v., 366  
 Murphy, R. v., 477, 479, 480  
 Murphy, Re, 80  
 Murray, R. v., 550  
 Murtagh (Ellen), R. v., 230  
 Mycock, R. v., 265, 270, 273, 277,  
     278, 281  
 Nasmith, R. v., 29, 30  
 Nethersole's Bail, 301  
 Newell v. Hemingway, 40  
 Newman v. Jones, 32  
 Niccolls, R. v., 256, 260  
 Nichols, R. v., 257, 261, 352  
 Nicholson v. Fields, 234  
 Nohro, Ex p., 156  
 Northcote v. Brunker, 535  
 Nugent, Ex p., 527  
 Nunn, R. v., 106, 108  
 O'Brian v. Knivan, 311  
 O'Brien v. Cogswell, 234  
 O'Connell v. The Queen, 259, 443,  
     444, 445, 448, 449  
 Ollifier, R. v., 272, 279  
 O'Neil v. Attorney-General, 533  
 Osler, R. v., 94  
 Overton v. Hunter, 110  
 Owen, R. v., 477  
 Oxford (Inhab. of), R. v., 256  
 Oxford Tramways Co. v. Sankey, 91  
 Paget, R. v., 352  
 Parker v. Baker, 311  
 Parker v. Kett, 311, 314



- Parlby, R. v., 372  
 Peacock v. Bell, 543  
 Pearce, R. v., 43  
 Pearson v. Shaw, 140  
 Peel, R. v., 352, 357, 359  
 People v. Board of Education, 27  
 People v. Nixon, 422  
 People v. Olcott, 255  
 People v. Saunders, 477  
 People v. Sharp, 383  
 People v. Smith, 422, 423  
 People v. Sully, 285  
 People v. Supervisors, 27  
 People v. Queen's County, 28  
 People v. Wilson, 230  
 Perley, R. v., 128  
 Perry v. Watts, 91  
 Peternan, R. v., 366, 367  
 Petersilea v. Stone, 314  
 Petherick v. Sargent, 110  
 Pettitmangin, R. v., 513, 518  
 Pharmaceutical Society v. L. & P.  
     Supply Association, 433  
 Pickford, R. v., 50  
 Pike, R. v., 364  
 Pirie v. Wyld, 479  
 Plowman, R. v., 174, 188, 195  
 Plowright, R. v., 155  
 Plummer, R. v., 29, 30  
 Plumstead Board v. Spackman, 234  
 Powell v. Kempton Park Co., 112  
 Prevost, R. v., 97, 102  
 Price v. Beadley, 106  
 Primelt, R. v., 272, 286  
 Prince, R. v., 537, 538  
 Queen's (The) Case, 477, 479  
 Queen (The) v. (Indexed under name  
     of defendant.)  
 Rand, R. v., 525  
 Reading, R. v., 162  
 Reeve R. v., 401  
 Regina v. (Indexed under name of  
     defendant.)  
 Rex. v. (Indexed under name of de-  
     fendant.)  
 Rendle, R. v., 443  
 Reynolds, Ex p., 220  
 Reynolds, Ex p., Re Reynolds, 479  
 Richardson, R. v., 262  
 Richards, R. v., 366  
 Richards v. The Queen, 456  
 Riel v. The Queen, 174  
 Rispal, R. v., 259  
 Roberts, R. v., 479  
 Robertson, R. v., 341, 343, 344, 346  
     349  
 Robinson, R. v., 53, 223, 377  
 Roden, R. v., 2  
 Rogers v. Hawken, 399  
 R. R. v. J. M., 422  
 Rose v. College of Physicians, 15  
 Rose, R. v., 128, 130  
 Rosing's Application, Re, 70  
 Row, R. v., 136  
 Royal Aquarium v. Parkinson, 511  
 Roy, Ex p., 127  
 Russell, Ex p., 130  
 Russell v. Chambers, 9  
 Russell, R. v., 443, 444  
 Russell v. The Queen, 427  
 St. Denis, R. v., 456, 543  
 St. Stephen (Town of) v. Charlotte,  
     25  
 Salford, R. v., 23  
 Sandeman v. Beach, 48, 112  
 Sanders, R. v., 313  
 Schofield, Ex p., 479  
 Scorey, R. v., 395  
 Scott v. Morley, 234  
 Scott, R. v., 374, 377, 478, 487  
 Scott v. The People, 443, 445  
 Sellers, R. v., 353  
 Seixo v. Provezende, 71  
 Seward, R. v., 262  
 Shellard, R. v., 479, 491  
 Sheriff of Middlesex, Case of, 137  
 Shields v. McKee, 477  
 Shields v. Peak, 180  
 Simmons, R. v., 513  
 Simpson, R. v., 219

- Simpson v. Ready, 105  
 Skiff v. People, 285  
 Sloggett, R. v., 376, 377, 390  
 Smith v. Beadnell, 479  
 Smith, R. v., 54, 73, 235, 237, 341, 342, 344  
 Smith (Charles), Re, 211  
 Somersetshire (Justices of), R. v., 140  
 Somers, R. v., 95, 116, 117  
 Solicitor, Re, 377  
 Southerton, R. v., 50, 54, 341, 342, 345  
 Spain, R. v., 47, 48, 116, 117  
 Spilsbury, R. v., 352  
 Sproule, Re, 543, 544, 545, 547, 548, 550  
 Stannard, R. v., 156  
 State v. Ahern, 462  
 State v. Ashworth, 362  
 State v. Carroll, 311  
 State v. Carver, 316  
 State v. Clark, 67  
 State v. Deusting, 111  
 State v. Elliott, 364  
 State v. Hadley, 477  
 State v. McKenzie, 162  
 State v. Round, 285  
 State v. Walker, 477  
 State v. Weddington, 467  
 State v. Williams, 353  
 State v. Wilkinson, 444, 446  
 State v. Witham, 9  
 Stather, Ex p., 541, 542  
 Steele, R. v., 95  
 Stevens v. Wood, 40  
 Stewart, R. v. 15, 116  
 Steinburg, R. v., 254  
 Stewart v. State, 9  
 Strahan, R. v., 381  
 Suffolk, R. v., 511  
 Surrey (Justices of), R. v., 24  
 Swann v. Broome, 453  
 Sweeting, R. v., 287  
 Taylor, R. v., 328, 331  
 Thomas v. Chirton, 395  
 Thomas, R. v., 160  
 Thompson, R. v., 223, 258, 398, 399  
 Tierney, R. v., 162  
 Timson, Re, 219, 220, 543  
 Tivnan, Re, 174  
 Tomlinson, R. v., 54, 55, 341, 343, 344, 345, 346, 347  
 Took's Case, 477  
 Townsend, R. v., 445, 448  
 Town of Moncton v. Hebert, 412  
 Town of St. Stephen v. The County of Charlotte, 25  
 Townshend, R. v., 444  
 Tracy v. People, 364  
 Trenton v. Dyer, 447  
 Truelove, R. v., 421, 422, 423  
 Tupper v. Murphy, 542  
 Turner, R. v., 254  
 Tutton v. Darke, 140  
 Tyler, R. v., 50  
 United States v. Wilson, 162  
 Urlin, R. v., 391  
 Valin v. Langlois, 174, 200  
 Van Boven's Case, 138  
 Van Butchell, R. v. 352  
 Verelst, R. v., 315  
 Waite v. Hundred of Stoke, 139  
 Wakley v. Cooke, 374, 379, 395  
 Walsh, R. v., 320, 336  
 Wallace, R. v., 117  
 Walton, R. v., 50, 55, 341, 343, 345, 346, 348, 349  
 Warburton (James) R. v., 213  
 Ward, R. v., 13  
 Wason, R. v., 428  
 Waterloo Mutual v. Robinson, 479  
 Watson's Case, 485  
 Watt v. People, 460  
 Welter, R. v., 223, 225, 229, 375, 377, 382, 385, 391, 395  
 Whalen v. The Queen, 97  
 Wheeler's Case, 477  
 Whitaker, R. v., 369  
 Whitchurch, R. v., 372

- White, R. v., 108  
Whitehead, R. v., 479  
Widdop, R. v., 478  
Wilcox v. Smith, 315  
Wiley, R. v., 383  
Williams, R. v., 111, 229, 374, 375,  
377, 379, 382, 383, 385, 389, 391,  
392, 395  
Williamson v. Commonwealth, 477  
Wilson, R. v., 443  
Wilson v. United States 459, 461,  
465  
Winslow, R. v., 2  
Winsor, R. v., 136, 139, 140  
Woodcock, R. v., 353, 362  
Woodward v. Ball, 117  
Wotherspoon & Currie, Re, 70  
Yean, R. v., 441  
Yeoveley, R. v., 13

# Canadian Criminal Cases.

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Reports of Cases in Criminal and Quasi-Criminal matters decided in the Courts of Canada and of the Provinces thereof.

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[HIGH COURT OF JUSTICE, ONTARIO.]

BEFORE BOYD, C., ROSE, J., AND FALCONBRIDGE, J.,  
[SITTING AS A COURT FOR CROWN CASES RESERVED.]

## THE QUEEN v. STERNAMAN.

*Poisoning—Intent—Proof of—New Trial—Cr. Code 748.*

1. Evidence is admissible on a charge of murder by poisoning to shew the administration of the same kind of poison by the prisoner to another person, as proving intent.
2. Evidence of similar symptoms of arsenical poisoning attending the death of prisoner's former husband following administration to him of food prepared by the prisoner is evidence to shew intent as regards a charge of arsenical poisoning of a second husband on evidence of arsenical poison of the latter and of similar preparation of food by the prisoner and her attendance on her husband during his illness.
3. A new trial granted by the Minister of Justice under Code Sec. 748, on the discovery of new evidence.

Crown case reserved by ARMOUR, C.J., as follows:—

"The prisoner was tried and convicted before me at the assizes held in and for the county of Haldimand, at Cayuga, on the 17th, 18th, and 19th days of November, 1897, on an indictment which charged her with the murder of her husband, George H. Sternaman, by arsenical poison.

"The death of George H. Sternaman took place in August, 1896, while he was living with the prisoner, who attended on him throughout his illness, and it was clearly

proved that his death was due to arsenical poisoning. In order to shew that the poisoning was designed and not accidental, the Crown offered evidence to prove that a former husband of the prisoner had been taken suddenly ill after eating food prepared by her, and that the circumstances and symptoms attending his illness and death were similar to those attending the illness and death of the second husband, George H. Sternaman, who had in the same way become suddenly ill after eating food prepared by the prisoner, and that such symptoms were those of arsenical poison. It was objected on behalf of the prisoner that this evidence was not admissible on this indictment. I admitted the evidence, but reserved for the Court of Appeal, being a Divisional Court of the High Court of Justice, the question whether evidence of the character above mentioned was admissible."

The case was heard by a Divisional Court composed of BOYD. C., ROSE and FALCONBRIDGE, JJ., on the 31st December, 1897.

*W. M. German*, for the prisoner. The principle of *Makin v. Attorney-General for New South Wales*, [1894] A. C. 57, is not applicable here, upon the evidence, which fails to shew that the first husband died from arsenical poisoning. [BOYD, C.—We cannot look at the evidence; we are confined to the four corners of the case as stated.] The only question, then, is whether evidence of the character mentioned was admissible, upon the facts as stated by the Chief Justice, and it is submitted it was not.

*J. R. Cartwright*, Q.C., (*Britton Osler* with him), for the Crown. This case comes strictly within the *Makin* case. The Court may also refer to these cases: *Regina v. Geering* (1849), 18 L. J. N. S. M. C. 215; *Regina v. Garner* (1863), 3 F. & F. 681, 4 F. & F. 346; *Regina v. Gray* (1866), 4 F. & F. 1102; *Regina v. Cotton* (1873), 12 Cox C. C. 400; *Regina v. Roden* (1874), *ib.* 630; *Regina v. Heesom* (1878), 14 Cox C. C. 40; *Regina v. Flannagan* (1884), 15 Cox C. C. 403; *Regina v. Winslow* (1860), 8 Cox C. C. 391 (disapproved in the *Makin* case).

January 3, 1898. BOYD, C.—

The question of law reserved for the Divisional Court is one touching the reception of evidence at the trial. It was proved that the death of George Sternaman was due to arsenical poisoning, and evidence was received (after objection) to shew that a former husband of the defendant had been taken suddenly ill after eating food prepared by her, and that the symptoms attending his illness and death were those of arsenical poisoning.

In our opinion, this evidence was admissible as going to shew intent and design on the part of the defendant, as was pointed out by Pollock, C. B., in *Regina v. Geering* (1849), 18 L. J. N. S. M. C. 215, a case which has been followed by many others, particularly *Regina v. Heesom* (1878), 14 Cox C. C. 40, and has received the stamp of approval from the Judicial Committee of the Privy Council in *Makin v. Attorney-General for New South Wales*, [1894] A. C. 57. It appears, therefore, that in point of law this evidence was admissible, and we so answer the case reserved.

It is noteworthy that in 1895 the Legislature of New Zealand passed an enactment based on the decision in the *Makin* case, that "on a charge of poisoning, in order to prove that the accused administered the poison as charged, or his intent in so doing, it may be proved that he administered, or attempted to administer, poison on other occasions to the same or other persons:" 1 *Journal of Comparative Legislation*, pp. 66, 67.

ROSE and FALCONBRIDGE, JJ., concurred.

Subsequently an application for a remission of the sentence or for a new trial was made to the Minister of Justice of Canada pursuant to Sec. 748, Criminal Code of Canada, 1892, upon which application an order was made as follows:

Ottawa, January 19, 1898.

THE HON. DAVID MILLS, Q.C., Minister of Justice—

The said Olive Adele Sternaman having been at the Sittings of the High Court of Justice for Ontario, at Cayuga,

on the 17th, 18th and 19th days of November, 1897, tried before the Honourable Chief Justice Armour and a jury upon an indictment charging her with the murder of her husband George A. Sternaman, to which indictment the said Olive Adele Sternaman had pleaded not guilty, and having been found guilty of the crime wherewith she was so charged, and having been thereupon sentenced to suffer death by hanging on the 20th day of January instant, and an application having been subsequently made for the mercy of the Crown on behalf of the said Olive Adele Sternaman, whereupon I, the undersigned, Minister of Justice for the Dominion of Canada, having considered the evidence taken and the proceedings had at the trial, although I entertain no doubt as to the propriety of the said conviction of said Olive Adele Sternaman upon the said evidence and proceedings, yet inasmuch as representations have been made upon the said application for clemency, and evidence and circumstances called to my attention which were not presented at the trial, or considered by the learned Chief Justice, or the jury, which throw doubt on the propriety of the said conviction, and on account of which I entertain a doubt whether the said Olive Adele Sternaman ought to have been convicted, and having made such enquiry as I think proper.

I do now hereby, in my capacity as Minister of Justice, as aforesaid, under the authority vested in me by Sec. 748 of the Criminal Code, 1892, order and direct that a new trial of the said Olive Adele Sternaman upon the said indictment for the crime wherewith she thereby stands charged be had before the High Court of Justice for Ontario on the 3rd day of May, 1898.

**Notes : *Evidence of Intent.***

In the case of *Makin v. New South Wales*, 1894, A.C. 57, the prisoners had been convicted of the wilful murder of an infant child received from its mother by the prisoners for adoption and whose body had been found buried in the garden of a house occupied by him, and it was held by the Judicial Committee of the Privy Council that evidence that

**Notes : (Continued.)**

several other infants had been received by the prisoners from their mother on like representations and on like terms, and that bodies of infants had been found buried in a similar manner in the gardens of several houses occupied by the prisoners, was relevant to the issue which had been tried by the jury, and was therefore admissible. The *Geering* case (18 L.J.N.S.M.C. 215) which was approved by the Judicial Committee, was one of arsenical poisoning, and Pollock, C.B., admitted evidence to shew that two sons of the prisoner, who had formed part of the same family, and for whom, as well as for her husband, the prisoner had cooked their food, had died of poison, the symptoms with all of them being the same. It is noteworthy, however, that in the latter case the administration to all of the parties appears to have been contemporaneous and with preparations of food made in quantities for all of the four persons and distributed to them on their leaving the house to go to their work. In this respect there is a material difference from the principal case.

In *R. v. Heeson*, 1878, 14 Cox C.C., 40, Lush, J., approved of and followed the decision in the *Geering* case and admitted evidence of both previous and subsequent deaths occurring under like circumstances and from similar symptoms, and held that where it was proved that a motive for the murder charged might exist from the fact of the prisoner having insured the life of the deceased, evidence might also be given upon the same indictment to shew an equal motive for the deaths of the others because of their having been similarly insured at the instance of the prisoner.



[SUPREME COURT OF THE NORTH-WEST  
TERRITORIES.]

BEFORE WETMORE, J., ROULEAU, J., McGUIRE, J., AND  
SCOTT, J., SITTING AS A COURT FOR CROWN  
CASES RESERVED.

THE QUEEN v. WYSE.

*Seduction—Corroboration—Cr. Code 684.*

1. The corroborative evidence "implicating" the accused which is made necessary by Criminal Code, Sec. 684, to sustain a charge of seduction of a girl under sixteen may consist of the prisoner's admission made after she attained sixteen that he had had connection with her.
2. A statement made by the accused before he was charged with the offence that he had been advised that if he could get the girl to marry him he would escape "punishment," is corroborative evidence "implicating" the accused and proper to be considered by a jury or by a judge exercising the functions of a jury.

This was a Crown case reserved by the Hon. Mr. Justice Richardson for the opinion of the Court under section 743 of the Criminal Code, 1892.

The prisoner was convicted by Richardson, J., for seducing a girl under the age of sixteen years, under sec. 181 of the Code which provides that "Every one is guilty of an indictable offence and liable to two years imprisonment who seduces or has illicit connection with any girl of previously chaste character of or above the age of fourteen years and under the age of sixteen years."

Sec. 684 provides that "No person accused of an offence under any of the hereunder mentioned sections shall be convicted upon the evidence of one witness, unless such witness is corroborated in some material particular by evidence implicating the accused..... (c) offences under part XIII, sections 181 to 190 inclusive."

In addition to the evidence of the girl, one of the witnesses testified to having found the prisoner and the girl in a house alone, and that the accused came out partly dressed, also that accused before being charged with the offence told him he had been advised if he could get the girl away and marry her he would escape punishment.

Another witness testified that accused admitted to him he

had "got there" with the girl, which conversation, however, took place after the girl had attained sixteen, the age limit.

*Secord, Q.C.*, for the Crown.

*T. C. Johnstone* for the prisoner.

Regina, N.W.T., June 10, 1895.

WETMORE, J.—

The learned trial judge having convicted the defendant must have found that the testimony of the prosecutrix was true, otherwise he could not have convicted. The only question reserved then is whether she was corroborated in some material particular by evidence implicating the accused to satisfy sec. 684 of the Criminal Code, 1892.

The alleged connection on which the charge is founded was alleged by the prosecutrix to have taken place on the 10th June, 1894. The prosecutrix was then under sixteen years of age. She became the age of sixteen years on the 14th July following. There is no doubt that there is corroborative testimony to establish the fact that the accused had illicit connection with the prosecutrix. But it is claimed that there is no corroborative testimony implicating the prisoner with having such connection before the girl reached the age of sixteen years, and that it was necessary to have corroborative testimony of that character to satisfy the section of the Code referred to.

I do not think it is necessary for the purposes of this case to lay down any broad rule for the construction of that section, because to use the language of such section, there was in my opinion corroborative evidence implicating the accused with having connection with the girl before the age of sixteen years.

It must be borne in mind that the word "implicating" is used in the section. The mere fact that the party accused had the opportunity of committing the offence would not in itself amount to corroborative testimony implicating the accused, but that fact, coupled with other facts, might have weight to establish the implication.

Here we have the important fact established beyond all question that the accused did have illicit connection with the

prosecutrix. Then we have the fact testified to that on the 10th June, the day the girl especially testified to, she and the accused were away together as testified to by her; then we have the further fact testified to that on the 17th June, which was before the prosecutrix became of age, on the occasion of McLean going to Nasmith's house, he found the accused and the prosecutrix in the house alone, and that the accused came out *partly dressed*, that he was leaving the sheep unattended to and refused to go with McLean to where the sheep were. Then we have further the statement to McLean, made before he was charged with any offence, that "he had been advised that if he could get the girl Annie away and marry her he would escape punishment." Punishment for what? If he had not had illicit connection with the girl until after she was sixteen, he had committed no offence, he had committed no act for which he would be liable to punishment. If this case had been tried before a jury all these facts and circumstances would have been proper to have been left to the jury as corroborative evidence, implicating the accused with having had connection with the girl before she arrived at the age of sixteen years, if the jury chose to so consider it, and, if the jury under such circumstances convicted, I think the conviction would not have been interfered with. I can quite imagine that a good many reasons might be urged to the jury against their considering the evidence sufficiently corroborative, but it would be a matter entirely for them, and if they found it sufficiently corroborative their finding would not be interfered with. No doubt the question whether there is any corroborative testimony is a question for the judge, but if there is any such testimony, the sufficiency of it and the weight to be given it is for the jury, unless, of course, the corroboration is so very slight that it ought not to be left to the jury at all. In this case the learned judge acted as judge and jury, and we must assume that he found every question of fact necessary to secure a conviction against the prisoner, otherwise he would not have convicted.

The question which the learned judge submitted, and the only one he could submit under section 743 of the Code, was the question of law, not the question of fact.

Although it is not necessary for the decision of the case in view of what I have above stated, I may add that I cannot help but think that the fact that the prisoner gave testimony in his own behalf, and swore that he first had connection with the girl at the end of September, while according to the evidence of Matchett, he admitted at a conversation in July, two months before, that he had "got there" with the prosecutrix are facts (although this admission was made after the girl reached the age of sixteen) which might be taken into consideration with the other facts as tending to implicate the accused in having connection with the girl before she became of that age.

I am of opinion that the conviction should be affirmed, and that the case should be remitted to the court below with directions to pass such sentence upon the accused as justice may require.

ROULEAU, J., MCGUIRE, J., AND SCOTT, J., concurred.

*Conviction affirmed.*

**Notes :** *Evidence of similar subsequent acts.*

It has been held that evidence of defendant's subsequent conduct in seeking to continue his illicit relation with the seduced person may be received as connected with and tending to corroborate the principal charge in a civil action for damages, as well as being matter of aggravation. *Russell v. Chambers*, 1883, 31 Minn. 54, 16 N.W. Rep. 458.

The reception of such evidence, in a criminal prosecution before a jury, is to be largely controlled by the judge who tries the cause, and the evidence is to be submitted to the jury, with proper explanation of its purpose and effect. *State v. Witham*, 1881, 72 Me. 531.

Both prior and subsequent acts to that charged in the indictment are admissible, if indicating a continuousness of illicit intercourse. *State v. Witham*, 1881, 72 Me. 531, 535.

If, however, the acts are too remote in point of time to afford any reasonable inference of guilt as to the offence charged, proof thereof should be rejected. *Stewart v. State*, 1887, 64 Miss. 626, 2 So. Rep. 73.

## [SUPREME COURT OF NOVA SCOTIA.]

BEFORE McDONALD, C. J., TOWNSHEND, J., GRAHAM, E. J.,  
AND MEAGHER, J.

## THE QUEEN v. McLEOD.

*Certiorari—Quashing Conviction—Costs where not opposed.*

1. A motion to quash a conviction being unopposed, no costs were allowed and terms were imposed that no action should be brought by defendant.
2. One magistrate has no jurisdiction to convict on a charge of using abusive language under R. S. Nova Scotia, 5th series, c. 103, and 1889, N. S., c. 36.

The defendant was convicted before a justice of the peace for the County of Pictou, for unlawfully using abusive language towards one Neil Hengley, on a public thoroughfare, "contrary to section 12, of chap. 162, Revised Statutes of Nova Scotia, Third Series, as amended by chapter 12 of the acts of the Legislature of Nova Scotia for 1869," and was fined two dollars and costs, and, in default of payment, was ordered to be imprisoned in the county jail for ten days. The conviction was brought into this court by a writ of *certiorari*, and a motion to quash the same for want of jurisdiction in the convicting magistrate was made.

1897, April 3rd. *J. J. Power*, in support of motion.  
*Nem. con.*

1897, May 8th. TOWNSHEND, J.—Assuming the offence to be within the powers of the local legislature, which is denied, the jurisdiction over the offence, is conferred by chap. 103, R. S., "Of Summary Convictions, &c." By sec. 2, subsec. 1, of that act is provided,—

"That in all cases where a fine or penalty is imposed by any statute or by-law, or ordinance made under the authority of any statute, and the amount thereof does not exceed forty dollars, and it is not expressly declared that the same is to be sued for, or recovered as a debt, or as a private debt, the same shall be recovered before, and may be inflicted by two justices of the peace, or a stipendiary or police magistrate,

and the proceedings in relation thereto, and to all matters connected therewith, shall be as in this chapter defined, and, as if the same were expressly declared to be recoverable before, or to be inflicted by such justices of the peace, or police magistrate, on summary conviction."

By sec. 28,—

"Every complaint and information shall be heard, tried, determined, and adjudged by one justice, or two or more justices of the peace, as may be directed by the act or law upon which the complaint or information is framed, or by any other act, or law in that behalf."

Section 29, which was repealed by chap. 36, acts of 1889, provided,—

"If there be no such direction in any act, or law, then the complaint, or information may be heard, tried, determined, and adjudged by any one justice for the territorial division, where the matter of complaint, or information arose."

If this section were now in force, the conviction could not be disturbed for want of jurisdiction. As the law stands, it is quite clear one magistrate could not convict for this offence. There is no provision in the act constituting the offence, directing who shall hear and determine the matter charged, and we are, therefore, compelled to go to the general act, chap. 103, to find the court competent to try and decide.

I can find no other provision in the statutes authorizing a single justice to try and determine the offence. As sec. 29, has been expressly repealed, the only inference which can legitimately be drawn is that the legislature intended to deprive one justice of the authority previously held.

I have not examined into the other points on which this conviction has been attacked as, for the reasons stated, it cannot be upheld.

As the motion was not opposed, it will be quashed, without costs, on the terms that no action is to be brought by the defendant.

**Notes :** *Costs on Certiorari—Practice.*

The English practice is not to grant costs on quashing a conviction brought up on *certiorari* whether opposed or not,

**Notes : (Continued.)**

Paley on Convictions, 7th Ed., 379, unless the process of the Court has been abused by being put in motion in a vexatious proceeding, *R. v. Edmonds*, 31 Eng. L. T., 237.

If the conviction is affirmed without amendment the prosecutor will, however, get his costs of opposing the motion, Paley on Convictions, 7th Ed., 379.

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[SUPREME COURT OF NEW BRUNSWICK.]

**Ex Parte LE BLANC.**

*Second offence—Time as regards information for first offence.*

1. A conviction for a second offence under the Canada Temperance Act must shew that the second offence was committed after the information had been laid for the first offence.

On the 23rd of February, 1895, Mr. Justice Hanington granted an order *nisi* for *certiorari* to remove a conviction of the applicant, Thos. Le Blanc, made by the Stipendiary Magistrate of the town of Moncton for a second offence for selling liquor, contrary to the provisions of the second part of The Canada Temperance Act. The particular ground was, that it did not appear by the conviction, that the second offence was committed after the information had been laid for the first offence. The first offence was for selling on a date between the first day of November, 1894, and the fourteenth day of November, 1894. The second conviction was for selling on a date between the fifteenth day of November, 1894, and the thirty-first day of January, 1895.

*F. A. McCully*, shewed cause.

*Jordan, Q.C.*, supported the rule.

*Cur. adv. vult.*

On a later day in Term, April 11, 1895, the judgment of the Court, [SIR JOHN C. ALLEN, C.J., taking no part,] was delivered by

TUCK, J. We are of opinion that sufficient has appeared to make the rule absolute.

*Rule absolute.*

**Notes : Previous Conviction—Proof of.**

A previous conviction must be proved by evidence in legal form which may be done (a) by the production from the proper custody of the conviction itself, and (b) by a copy of the conviction certified by the clerk of the peace or other officer having charge of the records of same, *R. v. Yeoveley*, 8 A. & E., 806; *R. v. Ward*, 6 C. & P., 366.

If the certificate or exemplification be that of a Court having a seal it must be certified under such seal; if the proceeding to be certified be before a justice of the peace or coroner, the proceeding may be under the hand *or* seal of such justice or coroner; and, if any such Court, justice or coroner has no seal, *or* so certifies, then a copy purporting to be certified under the signature of a judge or presiding magistrate of such Court or of such justice or coroner is admissible without any proof of the authenticity of such signature or other proof whatsoever. (Canada Evidence Act, 1893, s. 10.)

Certificates of previous convictions of a defendant of the same name and description as the accused are admissible as evidence without further proof that the accused was the person formerly convicted. *Ex parte Dugan*, 1893, 13 C.L.T., 249 (Sup. Ct., New Brunswick).

The accused is entitled to adduce evidence to prove that he is not the party previously convicted and the onus is upon him if the name and description correspond with his own, such being *prima facie* evidence of identity. *Ex parte Dugan*, 13 C.L.T., 249.

There is no power to punish, as for a third offence, unless there have been two prior convictions for offences of the same nature and unless such prior convictions are admitted or proved. *R. v. Clark*, 15 Ont., R. 49.

The question whether the defendant had been previously convicted or not is within the jurisdiction of the magistrate and his finding thereon on competent evidence is conclusive. *R. v. Brown*, 16 Ont., R. 41 (Q.B.D.)



## [HIGH COURT OF JUSTICE, ONTARIO.]

BEFORE GALT, C.J., AND ROSE, J., SITTING FOR THE  
COMMON PLEAS DIVISION.

## THE QUEEN v. HOWARTH.

(24 ONT. R. 561.)

*Ontario Medical Act—Druggist—Practising Medicine.*

1. A druggist is liable under R.S.O. 1897, c. 176; R.S.O. 1887, c. 148, for practising medicine without license if he assumes to discover the nature of the disease by enquiry from the purchaser as to the symptoms and advises the remedy he supplies.
2. If the purchaser tells the druggist his complaint, taking upon himself the determination of the symptoms, the druggist may legally inform him what remedies he has and advise as to the best remedy.
3. The fact that no additional charge was made above the ordinary price of the remedy does not make the transaction any the less a practising for gain, nor lead to the inference that the consideration should apply wholly to the price of the medicine, and not to the advice given in diagnosing the disease.
4. The statutory right to practice as an "apothecary" does not authorize the practising of medicine.

This was a motion to quash a conviction, for that the defendant not being registered pursuant to the Medical Act, did unlawfully practice medicine for hire, gain, and hope of reward, contrary to the form of the statute in such cases made and provided.

The facts are fully set out in the judgment of ROSE, J.

In Hilary Sittings, February 8th, 1894, before GALT, C.J., and ROSE, J., *Allan Cassels* supported the motion. The defendant was not practising medicine within the meaning of the Medical Act, R.S.O., ch. 148; and certainly not for gain, as he made no charge for advice, his charge merely being the fifty cents for the bottle of medicine he furnished. The defendant had a certificate under the Pharmacy Act, R.S.O. ch. 151, secs. 17 and 19, which entitled him to be registered as a pharmaceutical chemist, and to carry on the business of a chemist and druggist. Secs. 24, 29 and 31, shew he is entitled also to carry on the business or profession of an apothecary. He has the same rights and privileges which an

apothecary has in England, namely, the right to practice medicine, to prescribe and make up prescriptions, this being one of the incidents following the introduction of the English law into Canada : *Regina v. Hessin*, 44 U.C.R. 53 ; *Davies v. Macuna*, 29 Ch. D. 596, 600 ; *Apothecaries Co. v. Nottingham*, 34 L.T.N.S. 76 ; *Rose v. College of Physicians, London*, 5 Bro. Par. Cas. 553 ; *Apothecaries Co. v. Greenough*, 1 Q.B. 799, 804 ; *Apothecaries Co. v. Lotinga*, 2 M. & Rob. 495, 499 ; *Regina v. Coulson*, 13, C.L.T. 460.

*Osler, Q.C.*, contra. There was practising medicine here and for gain. It is impossible to distinguish what was paid for advice and what was paid for the medicine. The Medical Act, R.S.O. ch. 148, confines the practice of medicine to those registered under the Act ; and if a druggist desires to practice medicine he must be registered under it ; *Regina v. Hall*, 8 O.R. 407 ; *Regina v. Stewart*, 17 O.R. 4. The word "apothecary" has not the meaning ascribed it by the defendant. Apothecaries are merely druggists or pharmacists : Century Dictionary, tit., "apothecary," "chemist ;" Apothecaries Chemical Index, p. 29. In England apothecaries have more extensive powers than they have here ; but this is merely by reason of special statutes of local application. Apothecaries licensed by the Apothecaries Hall were entitled to practice medicine in the city of London and certain prescribed limits surrounding it, but in no other part of the British Isles. Subsequently the powers were extended to Scotland, and by subsequent Acts the powers were extended generally. These rights never extended to this country, and apothecaries are simply in the same position as apothecaries are in the United States, and as they were in the British Isles before their powers were extended. The case, which has been cited, of *Apothecaries Co. v. Nottingham*, 34 L.T.N.S., 76, is exactly in point. There the defendant, who was licensed as a druggist, was held liable for practising as an apothecary without being specially licensed therefor ; and this case is also important, as it was an action for a penalty.

February 10, 1894.

ROSE, J.—

The prosecutor is one Thomas Wasson, a detective employed by the College of Physicians and Surgeons. One James McLaughlin, as I understood it, went to the defendant's shop, and according to his evidence what took place was as follows : "I told the defendant how I felt. I told him I was sick. He told me to live on a milk diet ; gave me the bottle of medicine produced and some pills. I paid him fifty cents." The defendant's account substantially agrees with this evidence. He said : "McLaughlin didn't say he had diarrhoea, but his description of his illness lead me to believe he had diarrhoea." The defendant, therefore, obtained from the complainant information as to his symptoms and from the diagnosis that he made of the case, prescribed what he believed to be the proper remedy. The defendant further said : "I have several kinds of diarrhoea mixture and have to enquire symptoms sometimes in order to decide what mixture to give." This shews the custom or practice of the defendant.

Sec. 45 of R.S.O. 1887, ch. 148, being the Ontario Medical Act, enacts that "It shall not be lawful for any person not registered to practice medicine, surgery or midwifery for hire, gain, or hope of reward ;" and provides for summary conviction.

I do not see how it can be contended upon this evidence that the defendant did not practice medicine. The cases of *Apothecaries Co. v. Nottingham*, 34 L.T.N.S. 76, and *Regina v. Hall*, 8 O.R. 407, are clear authorities in favour of such finding. There was certainly evidence upon which the magistrate might find that the defendant practised medicine.

Mr. Cassels contended that this was not practicing medicine within the meaning of the section referred to ; secondly, that if it was, it was not for gain ; and, thirdly, that even if it was practicing medicine for gain, the defendant was entitled as an apothecary, to do what he did. I think, as I have said, that it was practicing medicine, and I have no

doubt that, on the authorities, it must be held that it was practising for gain.

The defendant says that he charged no more for the medicine than if he had not given the advice ; but we cannot divide the transaction and apply the consideration all to medicine. For the advice and the medicine the defendant received fifty cents. That he might charge somebody else the same figure for the medicine without the advice, does not, I think, entitle him to say that what he did was not for gain. There was evidence on this point before the magistrate. We cannot say that the magistrate improperly found that this was practising for gain.

Then was the defendant authorized to do what he did by the provisions of "The Pharmacy Act," R.S.O. ch. 151?"

Mr. Cassels' argument on this section was, as I understood it, as follows : Section 24 forbids anyone "selling or keeping open shop for retailing, dispensing, or compounding poisons," etc., or assuming or using the title of "chemist and druggist," or "chemist," or "druggist," or "pharmacist," or "apothecary," or "dispensing chemist," or "dispensing druggist," in any part of the Province of Ontario, unless such person is registered under the Act and has taken out a certificate under the provisions section 18 of the Act.

It was argued that if a person registered and took out a certificate, he might then use the titles above referred to, and might practice as an apothecary ; and section 31 was relied upon, which enacts that nothing in the Act shall prevent any person from selling goods of any kind to any person legally authorized to carry on the business of an apothecary, chemist, or druggist, etc.

I do not think this is a proper construction to be placed upon the statute. The two Acts, chapters 148 and 151, must be read together. Chapter 148, as we have seen, prohibits unregistered persons to practice medicine, and provides for registration of persons who have complied with the provisions of the Act. Chapter 151, prohibits persons to conduct

the business of a chemist and druggist unless registered under the provisions of that Act. It further provides that legally qualified medical practitioners under any of the Acts relating to the practice of medicine and surgery in the Province, may be registered as pharmaceutical chemists without undergoing examination, and that any member of the College of Physicians and Surgeons of Ontario, may engage in and carry on the business of an apothecary, chemist, or druggist without registration under the provisions of the Act.

Mr. Cassels' argument would amount to this, that while a medical practitioner, unless he is a member of the College of Physicians and Surgeons, must register under the Act in order to carry on the business of a chemist or druggist, any registered chemist or druggist may practice medicine without qualifying under the Ontario Medical Act. The privilege given to the members of the College of Physicians and Surgeons to engage in and carry on the business of an apothecary, chemist, or druggist without registration, makes it manifest that it was not intended by the Act that the mere fact of being a physician or surgeon, should qualify one to carry on the business of an apothecary, chemist, or druggist, without the permission of the statute. In other words, it was intended, I think, by the two Acts, to require a certificate of fitness to enable one to practice medicine, and a certificate of fitness to enable one to carry on the business of chemist or druggist. And if two persons, one practising medicine and the other carrying on the business of a chemist and druggist, would each be liable to penalties if they were not registered as provided by these Acts, it seems to me to be a *reductio ad absurdum* to contend that one person without registration may combine the practice of a profession of physician and surgeon with the carrying on of the business of chemist and druggist, and be exempt from the penalties under either Act; or, that by registering under the Pharmacy Act, he should be entitled to practice medicine without qualifying under the Medical Act.

The argument which Mr. Cassels rested upon the word

"apothecary," was derived from the privileges granted to apothecaries in Great Britain by special Acts, and do not, I think, apply to the consideration of this statute. I think, however, full meaning and effect can be given to the statutes, as I have read them, when one considers the meaning of the word "apothecary," apart from express legislation. I find in the Imperial Dictionary the following definition: "One who practices pharmacy; one who prepares drugs for medicinal uses and keeps them for sale. Formerly, an apothecary merely compounded and dispensed the prescriptions of a physician or surgeon. The term is now, however, also applied in England to those who practice in medicine, and at the same time deal in drugs."

And when under section 31 of chap. 151, we find the words "nor shall anything in this Act prevent any person whatsoever from selling goods of any kind to any person legally authorized to carry on the business of an apothecary," I think full force and meaning may be given to them by holding that no one is authorized to carry on the business of an apothecary, that is, to practice medicine, and at the same time deal in drugs, unless he is registered as a physician under the Ontario Medical Act, and also registered as a chemist and druggist under the Pharmacy Act. A certificate under the Pharmacy Act is a certificate of competency merely to conduct the business of a chemist and druggist.

To repeat what I have already said, the effect of the two statutes is to prevent any one from practising the profession of a physician or surgeon without a certificate under the Medical Act, and to prevent any one from carrying on the business of a chemist or druggist without a certificate under the Pharmacy Act; and a certificate under the Medical Act, except under the express provisions of the Pharmacy Act, would not entitle one to carry on the business of a chemist and druggist; nor would a certificate under the Pharmacy Act, without a certificate under the Medical Act, permit any one to practice medicine.

Mr. Baron Bramwell, in the above cited case of the *Apothecaries Co. v. Nottingham*, 34 L.T.N.S. 76, in charg-

ing the jury, said: "Perhaps you may think that a person has a right to practice as he likes, whether qualified or not; or, on the other hand, you may think that, whereas the poorer classes have no opportunity of judging of or ascertaining the qualifications of the person to whom they may resort for medical advice, the legislature should require such persons to possess proper skill and knowledge, and to obtain a certificate thereof. No doubt some persons like to go to unqualified practitioners so as to get advice cheap; but there is the law, and we have to observe it. If you think this man has 'acted or practised as an apothecary,' then you must find a verdict for the plaintiff. Indeed, I feel some little difficulty in putting the case to you, for, on the defendant's own admission, he says he prescribed, and that, if a person brought a child to him suffering from, say diarrhoea, and asked what was good for it, he gave a medicine; if, however, the case was serious, he sent the doctor. Surely this is acting and practising as an apothecary within the meaning of the Act. \* \* Possibly, if on some one or two occasions a customer had gone to the shop and asked for medicine, and the defendant had said it was good for his complaint, that advising might be too trivial to be worth taking notice of by suing under this Act; but here the defendant admits that he dispensed, and at the same time advised medicine habitually."

The above action was brought under the provisions of the Apothecaries' Act, 55 Geo. III, ch. 194, by sec. 14 of which before granting a certificate of fitness and qualification to practice as an apothecary, the Court of Examiners were authorized and required to examine the candidate for the purpose of ascertaining his skill and abilities in the science and practice of medicine.

I might add that, in my opinion, if one went to a chemist and druggist, and told him he had some particular complaint and asked the druggist if he had some medicine compounded for such complaint or ailment, and purchased the medicine on the advice of the chemist, that would not be practising medicine. Nor if one went to a chemist and druggist and

asked him which of two named compounds was considered the better medicine, would such information be practising medicine? I think a chemist and druggist may sell drugs or the compounds which he has, by telling intending purchasers their qualities and properties, and commend his goods as being fit for the purposes for which they are intended, and he may tell which is the better or best of those he is selling. If the purchaser takes upon himself the responsibility of determining the symptoms of his own case, and judging from such symptoms what trouble he is suffering from and the medicine he requires to relieve him from such suffering, he is not asking the chemist and druggist to advise him as to his ailments or troubles; nor is he asking him to perform the duties he might call upon his physician to do. A line, it seems to me, must be drawn between advising as to a remedy necessary for a disease, which the chemist or druggist assumes that he has discovered by enquiry from the purchaser as to the symptoms, and advising between different remedies for a complaint, which the intending purchaser informs the druggist he is troubled with. It is difficult to formulate, and I fear to confuse my meaning by attempting to define, but I venture to say, hoping that I may not be misunderstood, that a chemist or druggist is not entitled to ascertain from intending purchasers the symptoms and determine from them the disease, and prescribe a remedy; but he may, if the purchaser tells him his complaint and asks for a remedy, inform him what remedies he has for such complaint; and also inform him which, in his opinion, is the better or best remedy, leaving the purchaser to exercise his own judgment as to which of these preparations he may purchase.

Perhaps on the whole it would be better, without further attempting to define what practising medicine may be, to say that in this case, there was evidence upon which a magistrate might well find that the defendant was practising medicine for gain contrary to the provisions of the statute.

I think the motion must be dismissed with costs.

GALT, C.J., concurred.



**Notes :**

This case was followed in *Regina v. Coulson*, 1896, 27 Ont. R. 59, before Meredith, C.J., C.P., and Rose, J.

*Practising medicine—Meaning of.*

The statute is directed against an habitual or continuous course of conduct rather than against an individual act, as implied from the word "practice"; but the evidence, although dealing with the treatment of one person, may shew that it was a part and particular instance of a continued course of conduct, and, consequently, an offence within the meaning of the Act. *Apothecaries Co. v. Jones*, 1892, 1 Q.B. 89, 91. The medical attendance on three different persons at different times on the same day would, for that reason, not subject the accused to three penalties, but one penalty only, as the acts and attendances constitute but one offence. *Ibid.* To "practise" a calling does not mean to exercise it upon an isolated occasion, but to exercise it frequently, customarily or habitually. *Per Hawkins, J.*, in *Apothecaries Co. v. Jones*, 1892, 1 Q.B. 89, 94; *Clark v. Reg.*, 14 Q.B.D. 92.

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[SUPREME COURT OF NOVA SCOTIA.]

BEFORE McDONALD, C. J., GRAHAM, E. J., MEAGHER, J.,  
AND HENRY, J.

**IN RE TOWN COUNCIL OF NEW GLASGOW.***Certiorari—Non-judicial acts not reviewable.*

1. *Certiorari* lies only to inferior tribunals or officers exercising judicial functions, and the act to be reviewed must be judicial in its nature.
2. A town council which has passed a resolution to pay informers, other than the inspector, the costs and a proportion of the fine, when collected in prosecutions under the Canada Temperance Act, does not thereby exercise a judicial function.
3. Such a resolution is a ministerial or legislative act which the court has no jurisdiction to review or quash.

This was a motion by counsel on behalf of Daniel McDiarmid, a ratepayer of the Town of New Glasgow, for a

*certiorari* to bring into this court an order or resolution, made or passed by the Town Council of the Municipality of the Town of New Glasgow. The order or resolution referred to was as follows :—

“Whereas, dissatisfaction exists in regard to the enforcement of the C. T. Act ;

“And, whereas, prosecutions may be brought in the name of any person ;

“Therefore, resolved, that in any case where an information has been laid by any person, other than the inspector of license, that the said person laying the information, in case of a conviction being had, be entitled to the costs, and one-half of the fine collected, in the said case for the purposes of the act. It being understood that nothing shall be paid in any event until costs and fine are collected, and that the town officials afford every facility for the carrying out of the same, and in case of failure to convict, informant shall pay all his own costs.”

1897, April 2nd. *H. Mellish*, in support of motion.—The fines collected under The Canada Temperance Act are given to the council under order in council. Under the original act they belong to the Dominion. Stats. of Canada, 1886, ch. 48, sec. 2 ; Stats. of Canada, 1887, p. clvii. The town only takes the money as trustee for the purposes of the act. Acts 1895, ch. 2, sec. 39 ; Acts 1897, ch. 10, sec. 5, sub-sec. *a* and sec. 6. This is not one of the purposes of the act ; *Ex parte Kyle*, 14 Can. L. T., 52. The informer is to take part of the fine for the purposes of the act. This is illegal. The council cannot delegate their authority. The mode of enforcement of the act is expressly limited by legislation. *Certiorari* will lie in this case. *Queen v. Aberdare Canal Co.*, 14 Q. B., 854 ; *Queen v. Coles*, 8 Q. B., 75 ; 19 Pick., 298 ; *Mendon v. Worcester*, 2 Allen, 463 ; *Commonwealth v. Coombs*, 2 Mass., 489 ; *Queen v. Salford*, 18 Q. B., 685.

*H. McInnes*, contra.—*In re Caesar*, 12 U. C. Q. B., 342 ; *Daniels v. Municipal Council*, 10 U. C. Q. B., 478. If this is illegal *certiorari* is unnecessary. The purpose of *certiorari* is to clear the way for some judgment which may be a bar to

the remedy to which a party is entitled. If the resolution is illegal, it does not bar any remedy which parties may have. 21 Ont. R., 665; 5 Allen N. B., 161; *In re Assessment of Cameron*, 2 R. & G., 179; *Paley* on Convictions, 349. It cannot be said that McDiarmid is a person aggrieved. The court has discretion. There is nothing in the order in council to prohibit the town council from appointing as many inspectors as they like. The local act merely refers to the matter of assessment to pay the officer. It has no relation to the order in council. The words "for the purposes of the act" mean "for the purposes of enforcing the act." *Queen v. Justices of Surrey*, L. R. 5 Q. B., 472.

*H. Mellish*, in reply.—*Ex parte Kyle*, 32 N. B.

1897, May 8th. McDONALD, C. J.—By the Dominion Act, Chap. 48, 1886, it is enacted that where no other provision is made by any law of Canada for the application of any fine, penalty or forfeiture imposed for the violation of any such law, the same shall belong to the Crown for the public uses of Canada, and it was further enacted that the Governor-in-Council may, from time to time, direct that any fine, penalty or forfeiture, or any portion thereof, which would otherwise belong to the Crown, for the public uses in Canada, be paid to any provincial, municipal or local authority, which, wholly or in part, bears the expenses of administering the law under which such fine, penalty or forfeiture is imposed, or that the same be applied in any other manner best adapted to attain the objects of such law, and to secure its due administration.

By Order in Council, dated 15th November, 1886, all fines and penalties recovered under the Canada Temperance Act, within any city, or county or incorporated town, separated, for municipal purposes, from the county, which would otherwise belong to the Crown for the public uses of Canada, were directed to be paid to the treasurer of the city, county or incorporated town, for the purposes of the said Act.

The Canada Temperance Act, sec. 101, provides that any "prosecution for any penalty or punishment may be brought "by, or in the name of, the Collector of Inland Revenue,

“within whose official division the offence was committed, or  
“by, or in the name of, any person.”

Provision was made by the Nova Scotia Act, ch. 3, sec. 123, 1886, continued by chap. 2, sec. 139, 1895, for the appointment of inspectors in every municipality wherein the second part of the C. T. Act had been proclaimed, or should thereafter come in force, and authorizing the municipality to pay out of the funds of the municipality all court charges and expenses of enforcing and carrying out the provisions of the Act.

As to the jurisdiction of the town councils of incorporated towns, see chap. 1, sec. 65, Acts of 1888, and as to the right of this town to be paid the penalties collected within its limits, see *The Town of St. Stephen v. The County of Charlotte*, 24 Sup. C. C., 329.

The town of New Glasgow had, under the provisions of the Provincial Act, appointed an inspector, who was in office when the resolution complained of was passed.

The applicant sets out, in his notice of motion, no less than thirteen reasons for which, he claims, the application should be allowed. Into the merits of these reasons I do not propose to enter, because, in my opinion, we have no jurisdiction to interfere with the management of the affairs of the municipality in this particular case, and in the manner sought by this motion.

“*Certiorari* is a writ issuing from a superior court to an inferior tribunal or officer exercising judicial powers, where proceedings are summary, or in a course different from the common law, commanding the latter to return the records of the cause depending before it to the superior court. \* \* \* \* It lies only to inferior courts and officers exercising judicial functions, and the act to be reviewed must be judicial in its nature, and not ministerial or legislative.” 3 A. & E. Encyclopedia, 60-63.

In my opinion the municipal council of the incorporated town of New Glasgow, as to the subject matter complained of, is not, under the legislation from which it derives its authority, a judicial tribunal, nor was the resolution com-

plained of a judicial matter. It is, on the contrary, in the words of the authority quoted, clearly a ministerial or legislative exercise of their authority and functions, which this court has no jurisdiction to review.

The minute of council already referred to, gave the town council the absolute disposal of all fines and penalties collected within the limits of the municipality, for the purposes of the Act. To enable the council the more efficiently to discharge the obligations imposed upon them, the local legislature authorized the appointment of an inspector, whose duty it is to enforce the provisions of the Act, and also authorized and empowered the council "to pay out of the funds of the "municipality all costs, charges and expenses of enforcing "and carrying out the provisions of the said Act." In the effort to discharge the duty thus imposed upon them, the council, in their discretion, directed that, should any person, other than the inspector, who is paid a salary by the municipality, institute proceedings against any person for a violation of the C. T. Act, on payment of the amount of any penalty recovered with costs of the prosecution, the costs and one-half the fine should be paid to the successful prosecutor. This is, in my opinion, not only a ministerial or legislative exercise of its authority by the council, but a very wise and beneficent exercise of such authority, and is clearly not a subject for *certiorari* to this court. I have read carefully the reasons for the application attached to the notice of motion, and have to say that, as at present advised, there is not one to which I could assent. Legislation in Ontario confers upon the courts summary jurisdiction for the review and correction of municipal by-laws and resolutions which this court does not possess.

I think the application must be refused with costs. Among the cases cited at the argument I refer to *Queen v. Aberdare Canal Co.*, 14 A. & E., N. S., 854; 12 U. C. Q. B., 342; 21 Ont. Rep., 669; 5 Allen, N. B., 161; 2 Mass, 465.

GRAHAM, E. J.—The following resolution was passed by the town council of New Glasgow.

(Set out in opinion of McDONALD, C. J.)

And the application is for a writ of *certiorari* to quash it. The applicant is a resident ratepayer of the town, and, on that account, although all the other ratepayers would have the same interest, he claims the right to have the resolution removed. In my opinion, this resolution cannot be called a judicial proceeding. It lacks all the essential elements of a judicial determination of any question, or of the rights of parties. Indeed, one can hardly say who the parties would be in such a case, and who would now be entitled to the benefit of the recognizance for costs.

It is, perhaps, sufficient to say that the town council, in passing such a resolution, would not be exercising judicial functions, and therefore the writ will not lie.

The application will be dismissed.

MEAGHER, J.—The act sought to be brought up in this case was what may be called “administrative,” and, for that reason, I think *certiorari* will not lie.

HENRY, J.—I concur in the result arrived at by the rest of the court, but I wish to be understood as confining myself to the first part of the opinion read by His Lordship the Chief Justice. I understand the other remarks to be offered as not essential to the conclusion reached.

**Notes :** *Judicial and non-judicial proceedings.*

“A *certiorari* is an original writ issuing out of chancery, or the king’s bench, directed in the king’s name to the judges or officers of inferior courts, commanding them to return the records of a cause depending before them, to the end that the party may have the more sure and speedy justice before him, or such other justices as he shall assign to determine the cause.” Bacon’s Abr. “*Certiorari*” title (a). The selection of text-books by a board of education is non-judicial and cannot be reviewed on *certiorari*. *People v. Board of Education*, 54 Cal., 375; also the selection of an official newspaper, *Iowa News Co. v. Harris*, 62 Iowa, 501; also a resolution to pay bounties to soldiers. *People v.*

**Notes : (Continued.)**

*Supervisors*, 43 Barb. (N.Y.) 232. The establishment of a fire district by a board authorized so to do on the petition of the taxable inhabitants representing more than half the taxable real property is legislative, and not judicial. *People v. Queen's County*, 153 N.Y. 370, 47 N.E. Rep. 790.

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[HIGH COURT OF JUSTICE, ONTARIO.]

BEFORE ARMOUR, C.J., Q.B., FALCONBRIDGE, J., AND  
STREET, J., SITTING AS A COURT FOR  
CROWN CASES RESERVED.

**THE QUEEN v. ROBINSON.**

*Husband and wife—Failure to provide necessities—Cr. Code 210.*

1. Upon a prosecution under the Criminal Code, 1892, Sec. 210 (2) for omitting without lawful excuse to provide necessities for a wife, evidence is admissible, as tending to shew a lawful excuse, of an agreement between husband and wife at time of marriage that she should be supported as before the marriage and not by him until he could earn sufficient means for the maintenance of both.
2. Such evidence is admissible although it may not, if established, furnish an answer to the charge.

Crown case reserved by FERGUSON, J., at the Sandwich Spring Assizes, 1897.

The prisoner was indicted and convicted under sec. 210, sub-sec. 2, of the Criminal Code, 1892, which is as follows: "Every one who is under a legal duty to provide necessities for his wife, is criminally responsible for omitting, without lawful excuse, so to do, if the death of his wife is caused, or if her life is endangered, or her health is or is likely to be permanently injured by such omission."

Evidence was offered on behalf of the prisoner that at the time the marriage took place it was agreed between the prisoner and the person who became his wife that they were to live at their respective homes in the city of Windsor and be supported as before the marriage until the prisoner obtained a situation where he could earn sufficient for their maintenance. This evidence was rejected. The

question reserved was whether it should have been admitted.

The case was heard by ARMOUR, C.J., and FALCONBRIDGE and STREET, JJ., on the 10th May, 1897.

*F. C. Cooke*, for the prisoner, contended that evidence of such an agreement was admissible, citing *Regina v. Nasmith*, 42 U. C. R. at p. 249.

*J. R. Cartwright*, Q.C., for the Crown, contended that, although such evidence might be given in answer to an action by the wife for alimony, it could not be given in answer to an indictment of the prisoner for not performing his duty to the public. He cited *Regina v. Plummer*, 1 C. & K. 600; *Hunt v. DeBlaquière*, 5 Bing. 550.

ARMOUR, C.J., (at the close of the argument)—

The case reserved presents for our consideration the broad question whether, under any state of circumstances that might be shewn, or under any state of facts that might be proved, the evidence offered was admissible; and I think it undoubtedly was.

The evidence is not an absolute answer to the indictment, of course, but it is evidence to go to the jury of a lawful excuse; it is evidence which tends to shew a lawful excuse. It may not be decisive of the case, but it should have been admitted.

FALCONBRIDGE, J.—

I quite agree. It is not necessary, to render a particular item of evidence admissible, that that particular item must of itself, if established, furnish a complete answer to the charge. Whether it does or does not of itself constitute a defence, or only a link in the chain of defence, or no defence at all, must depend on the circumstances; but I do not see how the evidence could be excluded in view of the judgment in *Regina v. Nasmith*, 42 U. C. R. 242.

STREET, J.—

It is quite consistent with the evidence offered at the trial, as stated in the case submitted to us, that the pris-



oner may since his marriage have become possessed of ample means. It is, of course, a defence if the prisoner proves a present inability to support his wife; it is not a defence if he merely prove, as he proposed to do here, that at some former period, when he was not able to support her, they had agreed that he should not be called upon to support her until he was able. The offence is a public one, and cannot be met by a mere agreement between the husband and wife.

I cannot see that the evidence is admissible in any view.

New trial directed under sec. 746 of the Code; STREET, J., dissenting.

**Notes:** *Failure to provide necessities to wife—Lawful excuse.*

The fact that husband and wife are separated by common consent, and that the husband regularly pays the wife a stipulated allowance, does not absolve him altogether from responsibility, for if he be informed that she is without shelter and refuse to provide her with it, in consequence of which her death ensues, the husband may be indicted for manslaughter, if it can be shewn that her death was caused by the want of shelter or was thereby accelerated. *R. v. Plummer*, 1 C. & K. 601.

Under the present section of the Code, taken from 32-33 Vic. (Can.), c. 20, s. 25, the wilful omission to provide, etc., without lawful excuse, is what constitutes the offence. If it appears that instead of being wilful it is attributable solely to want of ability, that the wife is better able to support herself than the husband to support her, that she is in no need whatever of support and does not ask for it or require it, that she is living with another man as his wife, or that without justification she absents herself from the husband's roof, and without excuse refuses to return—in these, and similar cases, it would be absurd to convict the husband as a criminal. *Per* Harrison, C.J., in *R. v. Nasmith*, 1877, 42 U.C.R. 242, 249.

## [SUPREME COURT OF NEW BRUNSWICK.]

## Ex Parte COULSON.

*Certiorari—Review of findings—Intoxicating liquors—Sale by club.*

1. Findings of fact by the magistrate are not open to review on motion to quash conviction in *certiorari* proceedings, if there was evidence from which he might draw the conclusion he did.
2. The disposal of liquors to the members of a social club by the club steward acting for the club who owned the same is an offence against the Canada Temperance Act, if such were a device to evade its provisions.

In Easter Term, 1895, the Court granted a rule *nisi* for *certiorari* to remove a conviction of the applicant, William Coulson, had before the Police Magistrate of Chatham, for selling liquor contrary to the provisions of the second part of The Canada Temperance Act. The facts of the case were that Coulson was the steward of the Chatham Social Club, an unincorporated body established for social and literary purposes, with rules which provided for the purchase of liquor, its distribution at fixed prices amongst the members (regular and honorary), and the application of the profits for the general purposes of the club. Coulson gave liquor to a regular member, in good standing, and received from him the price fixed, which was the alleged offence. By the return, it appeared that the convicting magistrate found as a fact that the disposal of liquors to the members was a device, on their part, to evade the provisions of The Canada Temperance Act.

June 5, 1893, *L. A. Currey, Q.C.*, shewed cause. The question involved is one of fact, not of law. The magistrate found that it was a device to evade the law. *Reg. v. Austin*, 17 O.R., 743; *Com. v. Pomphret*, 137 Mass., 564; *Com. v. Eurig*, 145 Mass., 119; *Com. v. Ryan*, 152 Mass., 283. As to incorporated companies, see: *Bowyer v. Percy Supper Club*, [1893] 2 Q.B., 154; *Reg. v. Charles*, 24 O.R., 432. The magistrate having had some evidence upon which to base the conviction, *certiorari* will not lie. *Ex parte Daley*, 27 N. B. Rep., 129.

*W. Pugsley, Q.C.*, contra. The authority of *Graff v. Evans*, 8 Q.B.D., 373, is relied upon to support the contention that this was not a sale within the meaning of the Act. See also 3 Chitty's Stats. 650, *Newman v. Jones*, 17 Q.B.D., 132.

*Cur. adv. vult.*

The judgment of the Court [SIR JOHN C. ALLEN, C. J., and BARKER, J., taking no part] was now delivered by

VANWART, J. In Easter Term a rule *nisi*, returnable in Trinity, was granted for a *certiorari* to remove into this Court a conviction of the applicant, William Coulson, made by and before the Police Magistrate of Chatham, for selling intoxicating liquor contrary to the provisions of the second part of The Canada Temperance Act, Revised Statutes of Canada, cap. 106.

Section 99 of the Act enacts :

"From the day on which this part of the Act comes into force and takes effect in any County or City, and for so long thereafter as the same continues in force therein, no person shall, within such County or City, by himself, his clerk, servant or agent, expose or keep for sale, or directly or indirectly, on any pretence or upon any device, sell or barter, or, in consideration of the purchase of any other property, give to any other person any intoxicating liquor."

Section 100 enacts :

"Everyone who by himself, his clerk, servant or agent, exposes or keeps for sale, or directly or indirectly, on any pretence or by any device, sells or barter, or, in consideration of the purchase of any other property, gives to any other person any intoxicating liquor in violation of the second part of this Act, shall on summary conviction be liable to a penalty," etc.

Second : "Everyone who in the employment, or on the premises of another, so exposes or keeps for sale, or sells, or barter, or gives, in violation of the second part of this Act, any intoxicating liquor, is equally guilty with the principal, and shall on summary conviction be liable to the same penalty or punishment."

The evidence disclosed that a large number of persons, about 240, had associated themselves into what they called "The Chatham Social Club." The association was unincorporated. The members were governed by a written constitution and by-laws. The club rooms were in Chatham, a place in which the said Act had been adopted and was in force. The officers of the club were a president and secretary-treasurer. The affairs of the club were managed by a committee composed of the said officers and five other members, elected annually. An entrance fee was charged, which had been increased from time to time until, at the time of this prosecution, the fee for membership, for a resident in the County of Northumberland, was \$10, and for a non-resident \$5.

The object of the club, as stated in the constitution, was to promote social intercourse and harmony, and provide for amusement and entertainment among its members. A by-law provided that "the club rooms shall be open every week day from seven a.m. until not later than eleven o'clock p.m. Members shall have the privilege of obtaining out of the stock of the club such beverages, cigars, etc., and have the use of billiard table on payment of such amount as the managing committee agree upon."

The club was organized June 30th, 1890, when the constitution and by-laws were adopted. The president was authorized to call meetings whenever he might deem it advisable, or on request of any five members. Eight members constituted a quorum. Three days' notice of the annual meeting in November was required to be given by notice posted in the club rooms. No notice of any other meeting was required. The committee of management were, by resolution, empowered to provide liquors, eatables, card tables and draughts. Meetings, after the club was organized, were held frequently for the election of members; for example, on the evenings of June 30th, July 2, 3, 4, 7, 8, 9, 10, 11, 14, 15, 17, 18, 21, 22, 25, 28, 29, 1890. Such meetings were held, and, as appears from the records, no other business of any kind was transacted. Many of the persons elected to membership at these meetings were non-residents.

Examination of the records discloses that about all the business ever transacted at any of the meetings was the election of members. For such purpose the meetings were always held in the evenings, and with a frequency little less than in July, 1890.

Intoxicating liquors were kept on the premises in charge of the applicant, a paid servant (called steward) of the club.

The stock was purchased with funds of the club, and was dispensed to members at a fixed price to be paid by the members calling for the same. The rules provided that a person not a member could procure liquors. Any member was at liberty to take any number of non-resident persons into the club rooms and have them supplied with liquor by the glass.

It was admitted that the applicant had supplied intoxicating liquors in the club rooms and received pay therefor as steward.

It did not appear that there was any other provision made for the entertainment of the members, excepting that two billiard tables were, very shortly before this prosecution, placed in the rooms, but any member using them was obliged to pay a fee therefor. It also appeared that a former steward died a short time before this prosecution, and that during his stewardship the billiard tables were his property, and only purchased by the club after his decease.

The rule was moved for on two grounds :

1st. That there was not any evidence on which the magistrate was warranted in finding that there had been any violation of The Canada Temperance Act.

2nd. That the club was *bona fide* a club, and the dispensing of liquor under the circumstances did not constitute a sale within the meaning of the Act.

On the argument counsel asserted that the convicting magistrate found as a fact, under the evidence, that the club was *bona fide* a club.

The magistrate, with commendable precaution, delivered a written judgment.

I have read the judgment carefully, and cannot discover

that he made any such finding. That there may not be any doubt in the matter, I quote his language on that point :

" It is claimed by the defence that the club is a *bona fide* club. Now, by referring to the book of constitution, which is in evidence, it is seen that fully one-half of the names attached are those of non-residents of the county, many being transient visitors, commercial travellers, tourists and sea captains, having residence in United States, Ontario, Prince Edward Island and Great Britain. These persons have each to pay a fee in order to participate in the privileges of the club, and as all privileges, as far as shown, excepting the single one of obtaining intoxicating liquors, can be procured at other places in Chatham without having to pay any fee for the privilege, the only conclusion I can arrive at is that the club in question is a device or means by which the provisions of The Canada Temperance are violated, and that the defendant in his capacity as a steward of the club did so violate the Act."

Could the magistrate have more distinctly found that the club was not *bona fide* a club?

Can it be successfully contended that the evidence did not fully warrant the magistrate in arriving at the conclusion he did? I think, under the evidence, the magistrate could not reasonably have found differently.

Imagine a club or association formed for social intercourse and harmony, and its only equipment being billiard tables, card tables, cigars, and an unlimited supply of intoxicating liquors. The surprise to me is, that in a community where a law prohibiting the sale of intoxicating liquors is in force such a device for evading the law should have been tolerated for upwards of four years.

It is not open to this Court to review the findings of fact by the magistrate, if there was evidence from which he might draw the conclusion he did. *Ex parte Daley*, 27 N. B. Rep. 129.

I think on this ground the rule should be discharged.

Counsel stated, on argument, they were desirous of obtaining a judgment on the question whether, assuming the

club was *bona fide* a club and organized for the purposes avowed in the constitution, a dispensing of intoxicating liquor, the property of the club, by its steward, at a fixed price, to the members, would be a violation of the Act, and cited *Graff v. Evans*, 8 Q.B.D. 343, as an authority that it would not be.

While it is not necessary to determine the question for the purpose of deciding this case, I have no objection to stating my view.

The Canada Temperance Act is intended to effect a total prohibition of the traffic in intoxicating liquors. The legislation under which *Graff v. Evans* was decided recognizes the traffic, and was only intended to regulate it.

Section 3, Act 35 and 36 Vic., cap. 94, under which *Graff v. Evans* was decided, enacts: "That no person shall sell or expose for sale by retail any intoxicating liquors without being duly licensed to sell the same." Section 74 of the Act defines "license" as a license for the sale of intoxicating liquors granted by justices in pursuance of the "Intoxicating Liquor License Act, 1828."

In the Act of 1828 (9 Geo. IV., cap. 61), the recital is:

"Whereas it is expedient to reduce into one Act the laws relative to the licensing by justices of the peace persons keeping, or being about to keep, inns, alehouses and victualling houses to sell excisable liquors by retail to be drunk or consumed on the premises."

Section 37 declares the words "inns, alehouses and victualling houses," shall be deemed to include all houses in which shall be sold by retail any excisable liquor to be drunk on the premises.

In that case it was admitted the club was *bona fide* a club. The objects were stated to be social intercourse, mutual and moral improvement, aided by lectures and rational recreation. One object was to keep the members away from the public-house. At the club food and refreshments could be obtained, and also wine, beer and spirits on payment. There were 1,100 members who paid an entrance fee and periodical subscriptions. There was a managing

committee to conduct the general business of the club. Graff was the manager of the club, acting for the committee. The offence complained of was that one Foster, a member of the club, purchased at the bar of the club, from the barman, intoxicating liquor and paid for it.

The case was argued before Huddleston B. and Field J. The former, in delivering judgment, said :

"I think those who framed the legislation since 1828 never considered or intended clubs to come within the Licensing Acts. It seems to me clear that Foster had a property or at least an interest in the goods which were transferred. Mr. Hill rightly designated that interest as a one eleven hundredth share. Foster, on payment, got from the barman who served him the interest of the other 1,099 members who thereby transferred their interest to him. There was no transfer of the general or absolute property in the goods to Foster, but a transfer of a special interest. That, in my view, was the result of the transaction. I cannot think it was a sale of intoxicating liquors by retail."

Field J. says : "The question here is, Did Graff, the manager, who supplied the liquors to Foster, effect 'a sale' by retail? I think not. I think Foster was the owner of the property, together with all the other members of the club. Any member was entitled to obtain the goods on payment of the price. A sale involves the element of a bargain. There was no bargain here, nor any contract with Graff with respect to the goods. Foster was acting upon his rights as a member of the club, not by reason of any new contract, but under his old contract of association, by which he subscribed a sum to the funds of the club and became entitled to have ale and whiskey supplied to him as a member at a certain price. I cannot conceive it possible that Graff could have sued him for the price as the price of goods sold and delivered. There was no contract between two persons, because Foster was vendor as well as buyer. Taking the transaction to be a purchase by Foster of all the other members' shares in the goods, Foster was as much a co-owner as the vendor. I think it was a transfer of a special



property in the goods to Foster, which was not a sale within the meaning of the section."

This is the reasoning relied on as showing that the dispensing of liquor by Coulson was not a sale in law.

Did not Foster acquire an absolute property in the liquor transferred to him? It was so absolute that he could have maintained either replevin or trover against any person who interfered with his absolute possession or control, even against the other members of the club or any of them. Supposing the price paid had been for the interest of the 1,099 members only, would it not have been a sale, and could not the 1,099 members have maintained an action to recover the price? Would it have been any different in principle from a case where, in a partnership consisting of two members, one purchases the undivided interest in the joint personal property from the other? In the latter case, it seems to me it could not be successfully contended an action would not lie to recover the price agreed to be paid in an action at law. Again, in the latter case, suppose the sale by one partner had been of his individual interest to a third person, could not the vendor maintain an action for goods sold and delivered for the price?

It seems to me the transaction was a sale to Foster by the other members of the club of their interests in the liquor, and by original agreement of association, instead of the price being distributed among those interested, it was kept as a joint fund, and Foster, in order to retain his interests in the fund, paid a price covering the interest of himself in the liquor as well as that of his co-owners.

If Foster, by agreement, acquired any interest in the liquor for which he could be compelled to pay, it would be a purchase by him to that extent, and a sale by those whose interests he so acquired. The remedy to which recourse would have to be had to enforce the payment of the stipulated price would be immaterial.

Suppose Foster was a co-owner and the stipulated price included his own interest in the liquor, was it any the less a sale of the undivided interests of the 1,099?

It could only affect the right of the 1,099 to recover the price of their interests, viz., by having to resort to equity instead of bringing an action at law. Surely the 1,099 would not be without remedy in case of the sale being on credit.

I agree that "Foster was acting upon his rights as a member of the club, not by reason of any new contract, but under his own contract of association."

What was the contract? *Inter alia*, "to have liquor supplied to him as a member at a certain price."

The sale was not a sale by Graff alone. It was a sale by the 1,099 of their interests in the liquor pursuant to the contract of association. The club acted by means of the managing committee, and they through Graff, their manager, and he in turn through the barman. The barman was the agent of all the members.

Graff was no more a vendor than the others of the 1,099, and quite as much so. He was no more and no less liable to prosecution than any other of the 1,099. I think the 1,099 were liable to be prosecuted for the sale to Foster, unless the club did not come within the provisions of the Act on other grounds than the transaction not being a sale.

In my view, the transaction was a parting by 1,099 of the members with whatever interest they had in the liquor to Foster, the other member, for a monetary consideration. The result of the transaction was to vest the property so dealt with absolutely in Foster, and to extinguish the interests of all the other co-owners. I fail to see why such a transaction is not a sale. It might not be a sale such as is contemplated by the "Intoxicating Liquor Licensing Act, 1828," but it is such a transaction or sale as was intended to be prohibited by The Canada Temperance Act. I think it falls within not only the spirit but the letter of the Act.

I think on this ground, also, the rule should be discharged.

*Rule discharged.*

**Notes :** *Sale of liquor by club.*

A pretended club whose manager was the real proprietor

**Notes:** (*Continued.*)

and sold liquors to the members would not be exempt from penalties under a license law. *Evans v. Hemingway*, 52 J.P. 134.

The case of *Graff v. Evans*, criticized in the principal case, was quoted with approval in *Newell v. Hemingway*, 1888, 58 L.J.M.C. 46. In the latter case, it was held by Lord Coleridge, C.J., and Manisty, J., that the manager of a club in the form of a limited company, the shareholders of which were the members of the club, was not criminally liable as for a sale of liquors, for he was merely the hand that handed over the liquors to the members of the club by the orders of the directors. In the Lord Chief Justice's opinion, it would be going too far to call that a sale, and constitute an act of this kind a breach of the terms of the Act of Parliament. To supply liquors to other than members at the former's expense is undoubtedly an offence, and it will constitute a "sale" as a matter of law, though the party supplied goes through the form of paying through a member. *Stevens v. Wood*, 1890, 54 J.P. 742 (Hawkins, J., and Stephen, J.).

## [HIGH COURT OF JUSTICE, ONTARIO.]

BEFORE BOYD, C., FERGUSON, J., AND ROBERTSON, J.,  
SITTING AS A DIVISIONAL COURT.

## THE QUEEN v. CONLIN.

*Theft—Power of police magistrate—Cr. Code 344, 783, 785.*

1. Theft from the person is an indictable offence under Criminal Code, sec. 344, although the amount is less than \$10, and in consequence the case might have been summarily tried by a magistrate without the prisoner's consent.
2. If in such case the prisoner consents to be tried by a *police* magistrate having the extended powers of a Court of General Sessions, where such consent is given, he is liable to sentence for the more onerous punishment which the General Sessions might impose in excess of the powers of an ordinary magistrate.
3. The word "theft" in Criminal Code, sec. 783, covers the offence of "stealing from the person." (Per Boyd, C.)

Toronto, November 12, 1897.

Application upon the return of a writ of *habeas corpus* for the discharge of the prisoner from custody under a warrant of commitment issued by the police magistrate for the City of Hamilton, following a conviction for unlawfully stealing from the person of Mrs. G. A. Rose, one purse containing \$3.48 in money.

The material sections of the Criminal Code of Canada, 1892, are as follows :

344. Every one is guilty of an indictable offence and liable to fourteen years' imprisonment who steals any chattel, money or valuable security from the person of another.

783. Whenever any person is charged before a magistrate,

(a) With having committed theft, or obtained money or property by false pretences, or unlawfully received stolen property, and the value of the property alleged to have been stolen, obtained, or received, does not in the judgment of the magistrate exceed ten dollars ; or

(b) With having attempted to commit theft ;  
the magistrate may, subject to the provisions hereinafter made, hear and determine the charge in a summary way.

785. If any person is charged, in the Province of Ontario

before a police magistrate or before a stipendiary magistrate in any county, district, or provisional county in such Province, with having committed any offence for which he may be tried at a Court of General Sessions of the Peace, or if any person is committed to a gaol in the county, district or provisional county, under the warrant of any justice of the peace, for trial on a charge of being guilty of any such offence, such person may, with his own consent, be tried before such magistrate, and may, if found guilty, be sentenced by the magistrate to the same punishment as he would have been liable to if he had been tried before the Court of General Sessions of the Peace.

787. In the case of an offence against the person charged under paragraph (a) or (b) of section seven hundred and eighty-three, the magistrate, after hearing the whole case for the prosecution and for the defence, shall, if he finds the charge proved, convict the person charged, and commit him to the common goal or other place of confinement, there to be imprisoned, with or without hard labour, for any term not exceeding six months.

*DuVernet* for the prisoner.

*J. R. Cartwright*, Q.C., Deputy Attorney General, for the Crown.

Judgment was delivered on December 22nd, 1897, as follows:

FERGUSON, J.—

The charge against the defendant was stated as follows:—  
“For that the said Frank Conlin, in and at the said city of Hamilton, did on the 22nd day of May, instant, unlawfully steal one purse, containing \$3.48 in money, from the person of Mrs. G. A. Rose.”

The defendant consented to be tried, and was tried, before the police magistrate of Hamilton. He pleaded “guilty,” and was sentenced to three years’ imprisonment in the Provincial Penitentiary.

The case now is on the return of a *habeas corpus*, it being contended on behalf of the defendant that there was

no power to impose on him, for this offence, a sentence in excess of that provided for by sec. 787 of the Criminal Code, namely, imprisonment in the common gaol, with or without hard labour, for a term not exceeding six months.

The contention on the part of the Crown was that the case did not fall under the provisions of sec. 783, but under sec. 344, of the Code, and that the punishment for it might have been as great as fourteen years' imprisonment.

Looking at sec. 783, one sees that the words "larceny from the person" found in clause (a) of sec. 3 of ch. 176, R.S.C., from which this sec. 783 professes to be taken, are not contained in it. These words are left out, and stealing from the person is provided for by sec. 344 of the Code, as this offence was, in conjunction with robbery, provided for by sec. 32 of ch. 164, R.S.C.

By the Revised Statutes of Canada, 1886, "stealing from the person" is thus provided for (or against) by this sec. 32, and "larceny from the person" is provided for by clause (a) of sec. 3 of ch. 176. As it seems to me, the same offence is thus twice provided for.

That there was a broad distinction between "larceny" and "larceny from the person," seems clear by a reference to Chitty's Criminal Law, vol. 3, p. 942, and the case *The King v. Pearce* (1810), 2 Leach 1046, as well as Bishop's Criminal Law, sec. 598, all referred to by Mr. Cartwright on the argument. It is said in Chitty's Criminal Law that larceny is aggravated by the fact of the property being taken from the person of the owner.

It appears to me that "stealing from the person" may now be understood to fall under what was formerly meant by the expression "aggravated larceny," that is, larceny aggravated by the fact that the property was taken from the person. (There were many other ways in which the offence might be aggravated.)

The fact that "larceny from the person," or "stealing from the person," is omitted and left out of clause (a) of sec. 783 of the Code, leaving the offence specifically provided against by sec. 344 of the Code, seems to indicate, and I

think it does sufficiently indicate, an intention to leave the offence punishable under the provisions of sec. 344. I think this the section applicable to the case here. Even if I thought there was any conflict or difference between sec. 783 and sec. 344, I should be of the opinion that the specific provisions in sec. 344 would prevail over any general provision in the other section or sections.

Then, assuming that the offence charged against this defendant is to be dealt with under the provisions of sec. 344, the Court of General Sessions of the Peace would have jurisdiction to try the case ; and this being so, the police magistrate had the power and jurisdiction under the provisions of sec. 785 of the Code, there being the consent of the defendant to try the case and pronounce the same sentence as the defendant would have been liable to if he had been tried before the General Sessions of the Peace, and such sentence might be imprisonment for any period up to fourteen years. I think the conviction and sentence are right in law, and that we should not interfere with them or either of them on this motion.

The having of the body of the defendant in Court was dispensed with, and, in my view, he should remain where he is.

ROBERTSON, J.—

I have carefully considered all the statutes and cases referred to by Mr. DuVernet on behalf of the convict, and the conclusion I have come to is that the conviction is good. The crime charged is larceny or theft from the person ; it does not come under either paragraph (a) or (b) of sec. 783 of the Code, but comes under sec. 785, being an offence for which the accused could be tried at the Court of General Sessions of the Peace. The amount stolen, so far as the money is concerned, is under the \$10 limit, but that is not the gravamen of the offence. The words "from the person" constitute the characteristic of the crime, as distinguished from simple larceny, and whoever is guilty of such a crime is liable to fourteen years' imprisonment in the penitentiary.

Before the passing of 38 Vict., ch. 47, a police magistrate

had no jurisdiction in a case such as this; but by secs. 1 and 2 of that Act the jurisdiction was increased so as to enable him to try any case triable at the General Sessions of the Peace, much increasing, therefore, his powers under sec. 783 of the Code, which is a re-enacting of 32 & 33 Vict., ch. 32, sec. 2, and 40 Vict., ch. 31, sec. 3, as consolidated in R.S.C., 1886, ch. 176, sec. 3.

I think, therefore, the police magistrate had jurisdiction.

BOYD, C.—

It is not necessary to decide upon the matter mainly argued as to whether the term "theft," as used in sec. 783 of the Criminal Code, comprehends the former offences known as "simple larceny" and "larceny from the person." The old word "larceny" has disappeared from our criminal terminology, as simplified by the Code, and the word "theft" (*i.e.*, stealing) has been substituted (secs. 305 and 356). I favour the argument of Mr. DuVernet that the word "theft," as used in sec. 783, is of generic import, and is meant to cover the case of "stealing from the person," whether that be what was once called private larceny (*i.e.*, from a man's person without his knowledge), or open larceny (*i.e.*, with his knowledge); but that meaning is not decisive of the question before us. Because here the magistrate sat as the police magistrate of the city of Hamilton, and as such has jurisdiction under sec. 785 of the Criminal Code, with the consent of the person charged, to try any offence which might be tried at a Court of General Sessions. That provision extends to cases such as this, which are indictable offences under sec. 344 of the Code. Now, in this case, the conviction on its face cannot be challenged upon a writ of *habeas corpus*, for it appears that the defendant has been convicted of stealing from the person of Mrs. G. A. Rose, "one purse containing \$3.48 in money." The money value, under or over ten dollars, is not a material element under sec. 344, and the offence provided for in that section is triable by a police magistrate under sec. 785.

There is no ground for interference with the conviction or with the custody of the prisoner.



## [HIGH COURT OF JUSTICE, ONTARIO.]

BEFORE ARMOUR, C.J.Q.B., FALCONBRIDGE, J., AND  
STREET, J.

## THE QUEEN v. SOMERS.

(24 ONT. R. 244).

*Conviction—Uncertainty in—Costs of quashing—Practice.*

1. Cab-driving on Sunday is not an offence by the cab-driver under the Lord's Day Act of Ontario (R.S.O. 1897, c. 246 ; R.S.O. 1887, c. 203).
2. A conviction for doing worldly labour on Sunday contrary to the Lord's Day Act is void for uncertainty unless the acts constituting the offence are specified.
3. Costs of quashing a conviction are recoverable by action where no order of protection is made.
4. The practice is not to order costs against the informant on quashing a conviction.

Motion before the Queen's Bench Division at Toronto to make absolute a rule *nisi* to quash a summary conviction of the defendant by Mr. Baxter, a justice of the peace for the city of Toronto, acting for and at the request of the police magistrate, under the Lord's Day Act, R.S.O. 1887, ch. 203.

The conviction was "for that he, the said Thomas Somers, being a cab-driver, on the 5th day of March, 1893, at the city of Toronto, in the County of York, being the Lord's Day, did unlawfully exercise the worldly business of his ordinary calling as such cab-driver, (the same not being the conveying of travellers or Her Majesty's mail, by land or by water, nor selling drugs and medicines, nor other works of necessity, nor works of charity), contrary to the form of the statute," etc.

The defendant was a servant of one Charles Brown, the keeper of a livery stable in the city of Toronto, and on the day in question drove a cab belonging to Brown through the streets of the city, for hire.

R.S.O. ch. 203, sec. 1, is as follows: "It is not lawful for any merchant, tradesman, artificer, mechanic, workman, labourer, or other person whatsoever, on the Lord's Day, to

sell or publicly shew forth, or expose, or offer for sale, or to purchase, any goods, chattels, or other personal property, or any real estate whatsoever, or to do or exercise any worldly labour, business or work of his ordinary calling (conveying travellers or Her Majesty's mail, by land or by water, selling drugs and medicines, and other works of necessity and works of charity only excepted)."

November 24, 1893. *Tytler* moved the rule absolute before the full Court (ARMOUR, C.J., and FALCONBRIDGE and STREET, JJ.) He contended that the defendant did not come within any of the classes of persons mentioned in the section quoted, citing *Regina v. Budway*, 8 C. L. T. Occ. N. 269.

*Du Vernet*, for the informant, shewed cause.

The Court held that the words of the section did not apply to nor include the defendant, a cab-driver; and also that the conviction was bad for uncertainty, because it did not specify the act or acts which constituted the offence against the statute, referring to *Regina v. Spain*, 18 O. R. 385; and therefore that the conviction should be quashed.

*Tytler* asked for costs against the informant.

*Du Vernet* asked that there should be an order providing that no action should be brought against the magistrate or informant.

The Court referred to *Regina v. Johnston*, 38 U.C.R. 549, where it is laid down that the practice is not to give costs on quashing a conviction; and also remarked that the defendant could recover the costs in an action.

*Rule absolute quashing the conviction without costs.*

*No order for protection.*

#### **Notes : Conviction Void for Uncertainty.**

It is not sufficient, unless especially declared to be by statute, to describe the offence merely in the words of the statute; a conviction (Criminal Code, sec. 511) for unlawfully and maliciously committing damage, injury and spoil to and upon the real and personal property of A.B., is not suffi-

**Notes : (Continued.)**

cient without its being alleged what the particular act was which was done by the defendant which constituted such damage, injury or spoil, and what the particular nature and quality of the property real and personal was, in and upon which such damage, injury and spoil was committed, *R. v. Spain*, 1889, 18 Ont. R. 385 (Q.B.D.); *re Donnelly*, 20 U.C.C.P., 165.

*Cab-Driving*.—It had been held in *R. v. Budway*, 1888, 8 C.L.T. 269 (Q.B.D.), that the Lord's Day Act did not apply to the servant of a livery stable keeper, driving for the owner; see also *Sandeman v. Beach*, 4 B. & C., 96.

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[SUPREME COURT OF NEW BRUNSWICK.]

**THE QUEEN v. COLLINS.**

(CROWN CASE RESERVED.)

*Demand—Menaces—Misdirection.*

1. On a charge of delivering a letter demanding property with menaces and without reasonable and probable cause (Code, sec. 403), the question as to whether the demand was made without reasonable or probable cause is one of fact.
2. The onus of proof is upon the prosecution to prove a want of reasonable or probable cause.
3. A new trial should be ordered, if the judge's charge was so ambiguous that the jury *may* have been misled into thinking that a material issue of fact was withdrawn from their consideration as being a matter of law.

The defendant, Eliza J. Collins, was tried and convicted at the Carleton County Court, July Term, 1895, for delivering a letter demanding property with menaces, and without reasonable and probable cause. The indictment, which contained two counts, was framed under The Criminal Code, 1892, sec. 403, and was as follows :

The jurors for our Lady the Queen present, that Eliza J. Collins at the town of Woodstock, in the County of Carleton, on the eighth day of June, in the year of our Lord one

thousand eight hundred and ninety-five, did unlawfully cause to be received by Lemuel A. VanWart, of the town of Woodstock aforesaid, a certain letter demanding of the said Lemuel A. VanWart, "with menaces", certain property, consisting of goods and merchandise, the said demand being without reasonable and probable cause; and she, the said Eliza J. Collins, then well knew the contents of said letter, which is as follows:

"Now, if you don't let me have the things, I will make you a sorry man, for I will tell all about the Cedar Grove scrape, and everything I know about you. I don't want you to give me the things for nothing. I will pay you for them. I will write it all to your wife and put the law to you for what you have done and said. I will give you to 4 o'clock to bring the things to me, and if you don't I will tell all I know about you.

(Signed) "ELIZA J. COLLINS."

The second count was to like effect, except that it specified the goods demanded.

On the part of the prosecution, it was proved that the defendant went to the store kept by Lemuel A. VanWart, and ordered a general assortment of goods from Mrs. VanWart, who would not give them without consulting her husband, he not being then present, but promised to send them before a stated time, if he consented. The goods were not sent. The next day the defendant again called and saw VanWart, and reminded him that he had not delivered the goods. As she said nothing about paying for them, he remarked that he did not do much crediting, and did not care to open any new accounts. When leaving, she threw to him the letter set out in the indictment. The defendant, who testified on her own behalf, admitted the writing and delivering of the letter. She claimed that she had been a customer of VanWart's, and had always paid her bills; also, that on several occasions VanWart had taken liberties with her, made vulgar jokes about her marrying a young man, and insulted her.

Nov. 6; 1895. *D. B. Gallagher* moved to quash conviction on the ground that the evidence did not disclose any menace or criminal offence within the meaning of the statute; failing that, for a new trial, on the ground that the learned Judge misdirected the jury in telling them "that they may consider the letter as a demand, the delivery of the letter being proved, and that no reasonable cause shewn for the demand." He cited *Reg. v. Southerton*, 2 East P.C. 140; *Reg. v. Walton, L. & C.*, C.C. 288; *Rex v. Pickford*, 4 C. & P. 227; *Rex v. Chambers*, 16 L. T. R. (N.S.) 363; *Rex v. Tyler*, 1 Mood. C.C. 428.

*Blair, A. G.*, contra.

*Cur. adv. vult.*

The following judgments were delivered Feb. 7, 1896:

BARKER, J. The prisoner was found guilty of sending a letter demanding property, with menaces and without reasonable or probable cause, under sec. 403 of The Criminal Code. The letter in question was delivered to one Lemuel A. VanWart, who was a trader in Woodstock. It seems that the prisoner had bought goods of VanWart and paid for them on one or two occasions, and that shortly before this letter was sent she went to VanWart's shop, where she ordered some goods, about \$8.00 worth, from Mrs. VanWart, who was in charge, the order being taken down in the day book in the usual way. The prosecutor refused to deliver these goods, and it is said that the letter in question was sent in order to compel him to do so. The letter was signed by the prisoner, and she delivered it herself. I think the learned Judge of the County Court was right in refusing to direct the jury that the letter was not a demand with a menace. The learned Judge directed the jury as follows: "Did the letter contain a menace or threat such as may be considered to have an intended influence to, as it were, extract the goods with no reasonable or probable cause for making the demand? That they may consider the letter as a demand, the delivering of the letter being proved, and that no reasonable cause shewn for the demand."

I think the letter was a menace, and from the prisoner's own testimony I think it was intended to be a menace, to compel VanWart to part with his goods. The question as to whether the demand was made without reasonable or probable cause is one of fact, *Reg. v. Miard*, 1 Cox C.C. 22; and where any doubt exists on the point, the prosecutor is called upon to give some evidence of the want of reasonable and probable cause, *Roscoe Crim. Evid.* 932. I think there is some evidence to shew a reasonable and probable cause for making the demand, or, rather, to answer the case of the prosecution that there was none. The prisoner had before this bought goods which VanWart delivered, though the evidence does not shew whether they were cash purchases or not. Besides this the prisoner swears that VanWart had taken liberties with her, had made vulgar jokes to her about marrying a young man, and, on one occasion, had insulted her. She also swore that when thus insulted she told him she would make it hot for him, when he said not to say anything about it, and she could have what goods she wanted. This evidence is not denied. It may be that the prisoner from her previous dealings with VanWart, as well as from the other circumstances I have mentioned, had reasonable cause for asking a delivery of the goods she had ordered. It is said that this question was submitted to the jury. The Judge's charge is certainly not very exact on the point, and I must confess from the report of it I have given that I am in doubt whether he intended leaving this question to them or not. The last clause, however, seems to me to be an express direction that the jury might consider that no reasonable cause for the demand had been shewn. I think it is as much incumbent on the Crown to shew that the demand was made without any reasonable or probable cause, as that it was made with menaces, and that both of these are questions of fact. If the jury were misdirected, or the Judge's charge was ambiguous so that they may have been misled in thinking it was a matter of law, whether there was a want of reasonable or probable cause for making the demand, instead of one of fact, and which, therefore, they did not determine,

there ought to be a new trial, so that the question can be properly put to the jury.

I think there should be a new trial.

HANINGTON and LANDRY, JJ., concurred with BARKER, J.

TUCK, J. The defendant was indicted in the Carleton County Court, and found guilty, under section 403 of The Criminal Code, for sending and causing Lemuel A. VanWart to receive a letter, demanding of VanWart, with menaces, certain property, consisting of goods and merchandise.

The indictment contains two counts. In the first it is alleged that the defendant demanded goods and merchandise; in the second the goods are specified, as one gallon of molasses, one pound of tea, two pounds of butter, etc. The letter is as follows: "Now, if you don't let me have the things, I will make you a sorry man; for I will tell all about the Cedar Grove scrape, and everything I know about you. I don't want you to give me the things for nothing. I will pay you for them. I will write it all to your wife, and put the law to you for what you have done and said. I will give you to 4 o'clock to bring the things to me, and if you don't I will tell all I know about you.

(Signed) "ELIZA J. COLLINS."

The learned Judge of the County Court reserved a case upon points taken at the trial, and also upon the ground of misdirection.

It is contended that the indictment should be quashed, because the letter does not shew that a criminal offence has been committed; that the words used do not amount to a demand; that the first count does not set forth the goods demanded; and that the second count is bad, because it does not connect the goods specified with the demand.

I think that the learned Judge put a correct construction upon the language when he told the jury that they might consider the letter as a demand. True, the very word "demand" is not used; but when the prisoner says, "if

you don't let me have the things, I will make you a sorry man," it seems to me that these words mean a demand, and threat as well. It was for the Judge to construe the meaning of the language, and I think he has done so correctly. The concluding words of the letter—that is to say, "I will give you to 4 o'clock to bring the things to me, and if you don't I will tell all I know about you"—contain both demand and menace.

I think it is not necessary to set forth in the indictment the particular kind of goods demanded. Goods and merchandise are property, and the words of the section are, "demanding of any person with menaces, and without any reasonable or probable cause, any property, chattel, money, etc." But the second count names the kind of goods, and Mrs. VanWart in her evidence proves what goods the prisoner ordered. Both counts are in my opinion good.

In charging the jury, the learned Judge said "that they may consider the letter as a demand, the delivery of the letter being proved, and that no reasonable cause shewn for the demand."

It seems to me that the evidence justified this charge, and that there was no misdirection.

The jury was not misled, and the evidence justified their finding.

The conviction must be affirmed.

SIR JOHN C. ALLEN, C. J., and VANWART, J., took no part.

*New trial granted.*

**Notes :** *The demand.*

A letter signifying an intention to impute a crime to the party from whom it is attempted to obtain the property, in case he does not choose to comply with the sender's suggestion by delivering the property, is a sufficient demand. *R. v. Michael Robinson*, 1796, 2 Leach's Crown Cases 869; 2 East's Pleas of the Crown 1,110.

The want of reasonable or probable cause has reference to the demand made and not to the threatened accusation. *R. v. Hamilton*, 1 C. & K. 212.



**Notes : (Continued.)***Menace—Meaning of.*

The word "menace" means "a threat or threatening; the declaration or indication of a disposition or determination to inflict an evil; the indication of a probable evil or catastrophe to come." The word as here used in the Code (similar to Imp. Larceny Act, 1861, 24 and 25 Vic., c. 96, s. 44) is to be given its natural meaning, and will include menaces, or threats of a danger, by an accusation of misconduct, though of misconduct not amounting to a crime, and is not confined to a threat of injury to the person or property of the person threatened. Lord Russell in *R. v. Tomlinson*, 1895, 1 Q.B. 706, 708.

If the threat be to accuse of a crime, it is no less an offence because the person threatened was really guilty, for, if he was guilty, the accused ought to have prosecuted him for it, and not have extorted money from him. *R. v. Gardner*, 1824, 1 C. & P. 479.

The threat must be of such a nature as is calculated to overcome a firm and prudent man, and to induce him from fear to part with his money or property. *R. v. Southerton*, 6 East 126, per Lord Ellenborough; but this must be taken to refer to the nature of the demand itself, and not to the state of mind of the party on whom it is made, and if the threatening demand be of such a nature as is calculated to affect a man of a reasonably sound state of mind, the court will not enquire into the degree of nerve possessed by the individual. *R. v. Smith*, 1850, 19 L.J. N.S. M.C. 80, 82.

In the more recent case of *R. v. Tomlinson*, 1885, 1 Q.B. 706, 710, Mr. Justice Wills said that the threat must not be one that ought to influence nobody, and as persons who are thus practised upon are not, as a rule, of average firmness, there should be given in practice a liberal construction to the doctrine that the threat must be of a nature to operate on a man of reasonably sound or ordinarily firm mind.

*Menace—Question for jury.*

A threat or menace to execute a distress warrant which

**Notes :** (*Continued.*)

he had no authority to do is not necessarily of a character to excite either fear or alarm, but may be made with such gesture and demeanour, or with such other unnecessarily violent acts, or under such circumstances of intimidation, as to have that effect, and this should be decided by the jury. *R. v. Walton*, 1863, 1 Leigh & Cave's Crown Cases, 288, 298.

It is not for the judge to say, as a matter of law, that the conduct of the accused constituted a menace within the statute, and the jury should be told that the question was whether the threats or words used were such as would naturally and reasonably operate on the mind of a reasonable man; in other words, whether they would have such an effect on such a person as to deprive him of his free volition and put a compulsion on him to act as he would not act otherwise. *R. v. Tomlinson*, 1895, 1 Q.B. 706, 709.

## [COURT OF QUEEN'S BENCH, QUEBEC.]

CROWN SIDE.

BEFORE WURTELE, J.

**THE QUEEN v. WM. A. GRENIER.***Criminal libel—Plea of justification—Requisites of—Irregularity.*

1. A plea of justification to an indictment for defamatory libel must allege that the defamatory matter published is true and that it was for the public benefit that the alleged libel was published.
2. Such plea must then set forth concisely the particular facts by reason of which its publication was for the public good, but it must not contain the evidence by which it is proposed to prove such facts, nor any statements purely of comment or argument.
3. A plea of justification, which embodies a number of letters which it is proposed to use as evidence, and contains paragraphs of which the matter consists merely of comments and argument, is irregular and illegal.
4. The plea itself should be rejected from the record, or the illegal averment should be struck out, and the defendant allowed to plead anew.

Montreal, 22 March, 1897.

WURTELE, J.—

The defendant has been indicted for having published, on

the 26th day of September, 1896, at the city of Montreal, in a newspaper called "*La Libre Parole*," a false and defamatory libel concerning the Honorable Joseph Israel Tarte, knowing such libel to be false.

A reference to the newspaper shows that the libel is contained in an article under the head "Mr. Tarte," and consists, in short, in the defamatory statement that Mr. Tarte is a trafficker in public office and contracts, a boodler, a political acrobat and traitor, and a bankrupt, and that he had supported himself and his family on money which he had obtained by dubious ways.

The defendant has filed a plea which he calls a plea of justification, in which, besides averring the truth of the libel and that it was for the public benefit that it had been published, and setting forth the particular facts by reason of which it was for the public good that it was so published, he makes statements which contain merely comments and arguments, and he also embodied a number of letters to which he refers to establish the facts which he states made the publication of the alleged libel to be for the public good.

The private prosecutor complains of the insertion of these letters in the plea of justification, and has moved that the plea be rejected or that the parts of the plea containing the embodiment of the letters be struck.

To decide the question raised by the motion we have to see what are the rules which govern pleadings in criminal matters.

An indictment must state simply that the accused has committed an offence which is specified in clear and popular language, with only so much detail of the circumstances as may be sufficient to identify the transaction referred to. In one word, an indictment must be perfectly simple, and the only requirement is that the averments should be sufficient to define the matter to be tried and to form the basis of a record of the trial.

The plea of not guilty is made orally and is entered by the clerk of the Court on the back of the indictment.

The special pleas which are allowed by the criminal code

are made in writing and should contain only the statement in a summary form of the material facts on which the party pleading relies, but must not contain the evidence by which it is proposed to prove such facts, nor any statement purely of comment or argument. The existence, the date and the effect of the document on which the party pleadings relies may be mentioned, but the document itself cannot be embodied in the plea. As a rule no document can be read to the jury as evidence until the judge has ruled that it can be received, and therefore to embody a document relied on as evidence of the facts or circumstances alleged might place before the jury a document which might be disallowed by the judge on its production at the trial, and have the effect, notwithstanding its surreptitious exhibition, of unduly creating a prejudice in the minds of the jurors.

Under the provisions of the Criminal Code a plea of justification to an indictment for libel must allege that the defamatory matter published is true and that it was for the public benefit that such matter should be published, and then must set forth the particular fact or facts by reason of which such publication was for the public good.

In this case the defendant in preparing his plea of justification has not confined himself to the requirements of the Criminal Code, nor has he followed the plain rules of procedure in criminal matters. Instead of being a concise pleading setting forth simply the truth of the libel, its publication for the public benefit and the facts which rendered its publication for the public good, his plea is verbose and covers twenty-six pages of printed matter, contains paragraphs which are purely statements of comment and argument, and embodies letters which are referred to as evidence of his pretensions.

In its present state it is therefore irregular and illegal, and it cannot be allowed to remain as part of the record as it now stands.

It is true that if all these superfluous and illegal statements and the letters embodied in the plea were struck out, enough would remain to constitute a proper plea of justifica-

tion, but the erasement of these statements and letters would not leave the allegations left in the plea in a proper sequence ; and to simply order such erasement might therefore be prejudicial to the defendant. The plea as it is cannot remain as part of the record, but instead of amending it by striking out the objectional part, it will be more equitable to reject it altogether and allow the defendant to plead anew.

It is therefore ruled and ordered, after having heard the parties, on the motion of the private prosecutor and after due deliberation, that the plea of justification produced and filed in this case by the defendant William A. Grenier be struck and rejected from the record, and that he be allowed to plead anew within a delay of five days.

Motion granted and plea rejected, with leave to plead anew.

*H. C. St. Pierre, Q.C.*, for the private prosecutor,  
*C. A. Cornellier, Q.C.*, for the defendant.

**Notes :** *Criminal libel—Plea of justification.*

The defendant may plead not guilty, as well as a justification that the words are true, and that it was for the public benefit that they should be published. The defence of not guilty permits the defendant to show that the alleged libel was a fair and *bona fide* comment on a matter of public interest, or that the occasion of publication was privileged, or any other defence permitted by law, except that the alleged libel is true. Odgers on Libel, 3rd Ed. (1896), 330.

The following form of plea of justification following a plea of not guilty under the corresponding English Act (6 and 7 Vict., c. 96, s. 6) is provided by the English Crown Office Rules of 1886, form No. 81 :

“ And for a further plea the said *A. B.*, pursuant to the statute in that behalf, says that our said Lady the Queen ought not further to prosecute the said indictment [or information] against him, because he says that it is true that [*here allege the truth of every libellous part of the publication set out in the indictment*].

“ And the said *A. B.* further says that before and at the

**Notes : (Continued.)**

time of the publication in the said indictment [*or information*] mentioned [*here state facts which rendered the publication of benefit to the public*]; by reason whereof it was for the public benefit that the said matters so charged in the said indictment [*or information*] should be published ; and this he, the said *A. B.*, is ready to verify. Wherefore he prays judgment, and that by the Court here he may be dismissed and discharged from the said premises in the said indictment [*or information*] above specified."

## [SUPREME COURT OF NOVA SCOTIA.]

BEFORE McDONALD, C.J., TOWNSHEND, J., GRAHAM, E.J.,  
AND HENRY, J.

**THE QUEEN v. GAVIN.**

*Conviction—"Penalty"—Meaning of—No amendment where possibly greater than authorized—Criminal Code 872.*

1. The word "penalty," although generally applied to pecuniary punishment, as by fine, includes also punishment by imprisonment.
2. A conviction awarding ninety days' imprisonment as an alternative punishment on non-payment of a fine where the statute authorized three months' imprisonment is bad, as ninety days may possibly be more than three months.
3. Such a conviction under the Canada Temperance Act cannot be amended under sec. 117, because it imposes a "greater penalty than is authorized."

The defendant was convicted on the first day of August, 1896, before C. S. Muir, Esq., Stipendiary Magistrate in and for the Town of Parrsboro, in the County of Cumberland, for having unlawfully sold intoxicating liquors, between the 23rd day of April, A.D. 1896, and the 23rd day of July, A.D. 1896, at the said Town of Parrsboro, contrary to the provisions of the second part of the Canada Temperance Act, then in force in the said County of Cumberland, and was adjudged for said offence to forfeit and pay

the sum of \$50, to be paid and applied according to law, and also to pay the informant the sum of \$5.35 for his costs, and in default of sufficient distress to be imprisoned in the common jail of the County of Amherst, for the term of ninety days, unless, &c. This was a motion to set aside the conviction. The grounds mainly relied on are indicated in the judgment.

1897, March 26th. *A. Drysdale*, Q.C., in support of motion.

*W. B. A. Ritchie*, Q.C., contra.

1897, May 8th. HENRY, J., delivered the judgment of the court.

This was a motion to quash a conviction for a first offence under the Canada Temperance Act.

It was admitted by counsel for the prosecutor, that the conviction was bad, because it provided for an imprisonment for 90 days in default of payment of, or sufficient distress for the fine imposed, 90 days being possibly more than three calendar months.

We were, however, asked to allow this to be amended by virtue of secs. 117 and 118 of the act.

As the law stood under the Canada Temperance Act, and the Summary Convictions Act, the conviction could not, in the case of a conviction for a first or for a second offence, provide for imprisonment in default of the fine imposed.

In case of a third or subsequent offence, the punishment could and still can be imprisonment only. But sec. 872 of the Criminal Code enacts that :—

“Whenever a conviction adjudges a pecuniary penalty or compensation to be paid, . . . the justice, by his conviction, or order, after adjudging payment of such penalty, compensation or sum of money, with or without costs, may order and adjudge—

“That in default of payment thereof forthwith, or within a limited time, such penalty, compensation, or sum of money shall be levied by distress and sale of the goods and chattels

of the defendant, and if sufficient distress cannot be found, that the defendant be imprisoned in the common jail or other prison of the territorial division for which the justice is then acting, in the manner and for the time directed by the act or law authorizing such conviction, or order, or by this act, or for any period not exceeding three months, if the act, or law, authorizing the conviction, or order, does not specify imprisonment, or does not specify any term of imprisonment, unless such penalty, compensation, or sum of money, and costs, if the conviction order is made with costs, and the expenses of the distress, and of conveying the defendant to jail, are sooner paid."

The words of sec. 117 of the Canada Temperance Act which limit the large powers by virtue of which the court is enabled to amend or ignore defects in convictions are as follows,—"if no greater penalty is imposed than is authorized."

Now, the question we are asked to decide is this:—

"Does the word 'penalty,' as used in the words last above quoted, include imprisonment awarded under the code, as an alternative punishment with a fine imposed under the Canada Temperance Act?"

It was contended on behalf of the prosecutor that the limitation in sec. 117, to the powers of amendment applies exclusively to the adjudication, so far as it imposes the fine, or pecuniary penalty, as distinguished from the period of imprisonment awarded.

This contention is based upon a narrow, and, in my opinion, erroneous view of the meaning of the word "penalty" in the provision in question.

In support of this view it was pointed out that the word "penalty" as used in sec. 100 of the Canada Temperance Act (being the section providing for the punishment for violations of the act), obviously meant fine, as distinguished from imprisonment, and that, in sec. 872 of the code, under which alone, and for the first time, imprisonment could be awarded for a first offence under the Canada Temperance Act, the word is used so as not to include imprisonment.



The argument from this (a very obvious argument) was that the same word must have the same meaning given to it in section 117 of the earlier act.

It seems to me that there are several satisfactory answers to this contention.

While the word "penalty" is generally applied to pecuniary punishment, its primary meaning includes punishment by imprisonment as well as punishment by fine.

We have to say what it means, in the *proviso* we are now discussing.

The obvious sense of the thing is that the word is to be construed in its broadest sense. What sense would there be in providing that the conviction should be bad, if it imposed too large a fine, but good, notwithstanding the awarding of an unwarranted excess of imprisonment?

The argument for the narrow construction is fallacious.

When sec. 117 was enacted as part of the Canada Temperance Act, first and second offences were punishable only by a pecuniary penalty. This, doubtless, explains how the word "penalty" came to be used instead of the preferable word "punishment," which was used in the corresponding provision of the Summary Convictions Act, sec. 87. But the word, even previous to the enactment of the code, must have had the larger meaning in sec. 117. Otherwise the absurd result would follow that in the case of a conviction for a third offence, awarding excessive imprisonment, the conviction could be made good, while a dollar excess of fine in the case of a second offence, would render the conviction irremediably bad. This could not have been intended.

The contention based on sec. 872 of the code calls for a very short answer. It is quite true that the word "penalty" throughout that section means penalty as distinguished from imprisonment.

The section commences by using the words "pecuniary penalty" and continues (recognizing the two meanings of the word), to speak of "such" and "said" penalty. There is the same need for reading "penalty" in its comprehensive sense in the *proviso* in question, that there is for reading it

differently elsewhere, namely, the need of making, if possible, sense instead of nonsense of the law.

It is superfluous, but perhaps, worth while, to suggest the improbability of the same legislature enacting sec. 87 of the Summary Convictions Act, and using the word "penalty" in sec. 117 of the Canada Temperance Act in the restricted sense contended for on behalf of the prosecutor.

We are all of opinion that the conviction cannot be amended and must be quashed.

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[COURT OF QUEEN'S BENCH, QUEBEC.]

CORAM WURTELE, J., IN CHAMBERS.

**THE QUEEN v. ELISE REHE.**

*Prostitution—Meaning of—Indiscriminate lewdness—Criminal Code 207 (1).*

1. A woman who is kept by a married man and who surrenders herself to sexual intercourse with him alone, does not come under the purview of § (1) article 207 of the Criminal Code, which declares any one to be a vagrant who, having no peaceful profession or calling to maintain herself by, for the most part supports herself by the avails of prostitution.

Montreal, 17 May, 1897.

WURTELE, J.—

An information was laid before the Recorder of the City of Montreal, against Elise Rehe, charging her with being, on the 20th day of July, 1896, a loose, idle and disorderly person, or vagrant, because for several months she had had no peaceable profession or calling to maintain herself by, and had for the most part supported herself by the avails of prostitution, and on the 16th day of March last she was held and convicted by the Recorder, (B. A. T. DeMontigny, Esq.,) to be a vagrant, and was condemned to be imprisoned for six months, and to pay a fine of \$50, and in default of the payment of this fine to be imprisoned for a further term of three months. The conviction was made under paragraph L. of

article 207 of the Criminal Code, which declares to be a loose, idle or disorderly person, or vagrant, any one who "having "no peaceable profession or calling to maintain himself by, "for the most part supports himself by gaming or crime, or "by the avails of prostitution."

She was immediately arrested and is now in gaol, but she has appealed from the conviction on the ground that it is erroneous in point of law, and the Recorder has under the provisions of article 900 of the Criminal Code stated a case setting forth the facts and the grounds on which the conviction is questioned. Under this article a judge of the Court of Queen's Bench in chambers has power to hear and determine an appeal on any question of law arising on a summary conviction, and stated in a case prepared and signed by the convicting magistrate, and to affirm, reverse or modify the conviction.

It appears from the case that the information was laid under paragraph L. of the article respecting vagrancy, and that it had been proved that the appellant had no visible means of existence or peaceable profession capable of maintaining her, that she had been kept for several months by a married man, and that, for this consideration, she had prostituted herself to him alone.

The question stated by the case for the opinion and decision of the judge is:—Whether a woman who prostitutes herself exclusively to one man, for gain, but not publicly, falls under the scope of paragraph L. of article 207 of the Criminal Code.

In order to bring a person under the effect of this paragraph two things must be established in evidence:—1o. that the person has no peaceable profession or calling to maintain himself or herself by, and 2o. that he or she for the most part supports himself or herself by gaming or crime, or by the avails of prostitution. In the present case, the second circumstance, of which proof is required, is that the appellant supported herself by the avails of prostitution. The first circumstance,—that she had no visible means for her support,—has been proved, and we have now to see if the other

circumstance existed. We must see if prostitution existed in a legal sense, for if it did not, although she was kept and supported by a man with whom she had illicit sexual intercourse, she cannot be said to have been supported by the avails of prostitution.

Let us see therefore how the law defines a prostitute and prostitution. In the American and English Encyclopædia of Law, under the words "Prostitute and Prostitution," we find the following definitions:—"A prostitute is a female given to "indiscriminate lewdness for gain. The word prostitution "means the act or practice of a female offering her body to "an indiscriminate intercourse with men ; the common lewdness of a female. Intercourse with one man is not prostitution, the word prostitution as used in criminal statutes "meaning common, indiscriminate, meretricious illicit intercourse and not sexual intercourse confined exclusively to "one man."

Under these definitions, it is clear that in the present cause, as the facts are set forth in the case stated by the Recorder, although prostitution is the general sense of a woman submitting herself to illicit sexual intercourse with a man may have existed, still prostitution in a restricted and legal sense did not exist ; and that the appellant cannot be held to have supported herself by the avails of prostitution. The case cannot therefore be brought under paragraph L. of article 207 of the Criminal Code, and the conviction is erroneous in point of law.

And in point of fact what the article in question of the Criminal Code has generally in view by its enactments with respect to indecent exhibitions, disturbances, prostitutes and houses of ill-fame, is the repression of acts which outrage public decency and are injurious to public morals. In the present case, however, while the appellant broke a moral law, her ill-doing was done in private and did not outrage public decency, nor violate any provision of the criminal law of the land.

I find a precedent for this ruling in the judgment rendered by the Court of Appeal on the 27th day of January, 1891, in

the case of Eugenie Gareau, which was delivered by the late Chief Justice Sir A. A. Dorion. This woman had been convicted by the Recorder, (Mr. DeMontigny), as a vagrant under paragraph J. of the article of the Criminal Code respecting vagrancy, for having kept for more than three months a disorderly house, (being a room in No. 298 of St. Dominique Street) for the purposes of prostitution with a man who was not her husband and who paid her ; and on a writ of *habeas corpus* the Court unanimously held that the resorting to her room by only one man did not constitute it a disorderly house, and that her illicit intercourse with one man alone did not constitute prostitution within the meaning of the paragraph, and the conviction was consequently declared illegal and quashed.

I therefore declare the conviction made in this case erroneous in point of law and illegal, and I reverse and quash the same ; and I order that the appellant Elise Rehe be discharged and liberated from her imprisonment in the common gaol of this district, if she be not detained for some other cause.

The text of the judgment is as follows :—

“Having heard the appellant by her counsel, the Crown by the substitute of the Attorney-General, J. L. Archambault, Q.C., and the Recorder of the City of Montreal, by L. Forget, the clerk of the Recorder's Court ; having examined the case stated by the Recorder of the City of Montreal, B. A. T. DeMontigny, Esquire, setting forth the facts and the grounds on which the conviction made by him on the 16th day of March last (1897) is questioned, by which conviction he declares the appellant to have been a loose, idle and disorderly person or vagrant, because for several months she had had no peaceable profession or calling to maintain herself by and had for the most part supported herself by the avails of prostitution, and condemns her to be imprisoned for six months and to pay a fine of \$50, and in default of payment of such fine to be imprisoned for a further term of three months ; and having had due deliberation ;

“Considering that under the circumstances mentioned

and set forth in the stated case, to wit :—that having no visible means of living or calling capable of maintaining her, she had been kept for several months by a married man and for that consideration had prostituted herself to him alone, prostitution in the sense of paragraph L. of article 207 of the Criminal Code did not exist, and that she consequently could not be held to have supported herself by the avails of prostitution ;

“Considering that the conviction is therefore erroneous in point of law and illegal ;

“I, the Honorable Jonathan S. C. Wurtele, one of the Judges of the Court of Queen's Bench, sitting and acting in Chambers under the authority and jurisdiction conferred by article 900 of the Criminal Code, declare the above mentioned conviction, which has been appealed from under and in virtue of the above mentioned article, to be erroneous in point of law and illegal, and I reverse and quash the same, and I order that the appellant Elise Rehe be discharged and liberated from her imprisonment in the common gaol of this district, if she be not detained for some other cause, and that for such discharge and liberation the production of a duly certified copy of this judgment shall be a sufficient warrant to the keeper of the common gaol of the district of Montreal.”

Conviction quashed.

*A. A. Gauthier*, for the appellant.

*J. L. Archambault, Q.C.*, for the Crown.

*L. Forget*, clerk of the Recorder's Court, on behalf of the Recorder.

**Notes : Prostitution defined.**

If a woman submits to indiscriminate sexual intercourse, which she invites or solicits by word or act or any device, such constitutes prostitution, whether done for gain or not. *State v. Clark*, 1889, 78 Iowa 492.

Offences of this nature not being the subject of punishment at common law, there is no common law definition of the term, and a strict construction should be adopted in construing a statute creating a new criminal offence.

*Commonwealth v. Cook*, 1846, 12 Metcalf (Mass.) 93, 96 ;  
*Henderson v. People*, 124 Ill. 607.

Although the word is sometimes used in a more loose and general sense in reports of judicial decisions (1 W. Bl. 519, 3 Bur. 1569, 13 S. & R. 32), it must be assumed that the Legislature intended to use it in its appropriate and well-authorized meaning. *Commonwealth v. Cook*, 1846, 12 Met. (Mass.) 93 ; *Carpenter v. People*, 1850, 8 Barber (N.Y.) 603, 611.

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[COURT OF QUEEN'S BENCH, QUEBEC.]

CROWN SIDE.

CORAM WURTELE, J.

THE QUEEN v. AUTHIER.

*Trade-mark—Forgery of—Evidence—Cr. Code 448.*

1. Where a trade-mark is complained of as being forged and as infringing the rights of the proprietor of a duly registered trade-mark, any resemblance of a nature to mislead an incautious or unwary purchaser, or calculated to lead persons to believe that the goods marked are the manufacture of some person other than the actual manufacturer, is sufficient to bring the person using such trade-mark under the purview of article 448 of the Criminal Code, which prohibits the sale of goods falsely marked.
2. In such cases it is not necessary that the resemblance should be such as to deceive persons who might see the two marks placed side by side, or who might examine them critically.
3. The Canadian law respecting trade-marks being derived from English legislation, reference for its interpretation should be had to English decisions, more especially as the law extends throughout the Dominion, and it is desirable that the jurisprudence should be uniform.

Montreal, 24 April, 1897.

WURTELE, J.—

This is an appeal from a conviction by the Police Magistrate, under which the defendant, C. E. E. Authier, a grocer on St. Catherine Street, was convicted of having in his possession bottles of gin to which a label had been affixed so nearly resembling the registered trade-mark of Messrs. John De Kuyper & Son as to be calculated to deceive.

The offence of which the defendant is accused is that provided for in section 448 of the Criminal Code of Canada, which deals with the forgery of trade-marks and the fraudulent marking of merchandise. Under that section everybody is guilty of an indictable offence who sells or has in his possession for sale, or for any purpose of trade, any goods to which a forged trade-mark or a false trade description is applied, or to which a mark so nearly resembling a trade-mark as to be calculated to deceive is falsely applied. Now, under section 443, sub-section 2, the provisions relating to the application of a false trade description of goods extend to the application to goods of marks which are reasonably calculated to lead persons to believe that the goods are the manufacture or merchandise of some person other than the person whose manufacture or merchandise they really are. Under article 450 any one charged with the commission of the offence of selling goods falsely marked is also liable to be tried in a summary way and to be punished on summary conviction.

In this case the defendant does not dispute the sale of the goods in question nor the fact that he keeps goods similarly marked for the purposes of trade, but he says that he is within his legal rights in doing so; in other words that the mark he uses is not calculated to deceive. The issue which I have to decide therefore is one of fact, namely, as to whether the so-called Peg-top label which the defendant uses is calculated to deceive. There have been a number of witnesses examined upon both sides at the trial of this case, some of whom testified that incautious or unwary purchasers of goods of this description might be deceived by the use of the defendant's label into believing that they were buying the goods of Messrs. John De Kuyper & Son. As I do not find that under the circumstances this evidence is necessary in order to enable me to come to a conclusion I will not enter into it. I am entitled to examine the label for myself and to form a conclusion as to the resemblance. *In re Marks & Tellefsen's Application*, 63 L. T. 234. In so doing I have to bear in mind the circumstances and conditions under which



the two labels are used. *Wotherspoon & Currie*, 5 E. & I. App., p. 508; *In re Beigel's Application*, 57, L. T., p. 247; *Re Rosing's Application*, 54 L. J. Chy. p. 975. They are both applied to the sale of gin, both used upon bottles of the same shape, height and color, sealed with wax of the same color and the label affixed to each bottle in the same place. Looked upon at a little distance the general effect of the two packages is the same. It is not claimed by the prosecution that a cautious purchaser would be deceived by the resemblance. The plaintiffs' label is a white heart-shaped piece of paper upon which is printed the word "Geneva" in large letters, and other matter in smaller characters. The defendant's label is also upon white paper and is shaped so as to have a resemblance to a peg-top, or more accurately speaking to the section of a peg-top. It also bears on it the word "Geneva" and other matter in smaller characters, but in size and general effect it resembles the other label. It is obvious that any person of ordinary intelligence comparing the two side by side would detect the points of difference between them, but these are not the persons whom the law desires to protect. The object of the legislation in this country, I take to be to protect the owners of trade-marks so as to secure to them the benefit of the money and time which they have expended in building up a market for their own goods, and to do this the legislature must protect them with respect not to the intelligent and wary purchaser, but to the unwary one. *Per* Lord Kingsdown in *Leather Cloth Co. v. American Leather Cloth Co.*, 11 H. L. C., p. 539. Lord Chelmsford in *Wotherspoon & Currie*, L. R. 5 E. & I. App. 519. In my opinion there is a sufficient resemblance between the two labels used in the way they are to justify me in saying that the defendant's label is calculated to deceive.

The facts of the case would also indicate that such was the intention. It was stated, though not proved in evidence, that the defendant had recently prepared a gin of a peculiar flavor which he desires to put upon the market and to distinguish from other gins already known to the trade. If such is the case, his gin cannot yet have any special reputation or

be particularly known under the label which is complained of. In August last it appears that he used a white heart-shaped label. Messrs. John Hope & Co., who represent Messrs. John De Kuyper & Son in Canada, notified the defendant that if the use of this label was not discontinued, legal proceedings would be taken against him, and he thereupon agreed to withdraw the objectionable label and wrote a letter, which is filed, to the effect that he would not use it in future. Almost immediately afterwards he appears to have devised this peg-top label. Why he should have done so, if his intention was to absolutely distinguish his goods from those of others, it is difficult to understand. The gin of Messrs. John De Kuyper & Son was probably the best known in the market. It appears by the evidence of Mr. Langlois to have a larger sale than any other, and by the evidence of Mr. Lajoie to be known as "heart gin." Now, if the defendant was seeking to adopt some form of label which would distinguish his gin, he would naturally have adopted some form of mark, hundreds of which might suggest themselves, not in any way resembling that of Messrs. John De Kuyper & Son; he does not do this, but applies the whole of his ingenuity to devising something that is as nearly like the label of Messrs. John De Kuyper & Son as it possibly can be, and yet have distinctions which can be pointed out by a person of ordinary intelligence.

In *Seixo v. Provesende*, 1 Chy. App., p. 196, Lord Cranworth, L. C., said, "It would be a mistake to suppose "that "the resemblance must be such as would deceive persons "who would see the two marks placed side by side." The rule so restricted would be of no practical use.

It appears by the evidence of Mr. Ethier, examined on behalf of the defendant, that Mr. Authier consulted him before using this label, told him of his previous trouble with Messrs. Hope & Co. with regard to the label he had been using, and then asked Mr. Ethier's opinion as to whether he would get into trouble by using the label he proposed to adopt, and thereupon Mr. Ethier expressed his opinion in the negative; at the same time, however, he advised him to sub-

mit the label to Messrs. Hope & Co. before he used it, but this Mr. Authier said he would not do and does not appear to have done.

As regards the want of proof as to any persons having been actually deceived I would refer to *Johnson v. Orr Ewing*, 7 App. Cases, 219, where Lord Blackburn quotes with approval the words of Lord Justice James, "The very life of "a trade-mark depends on the promptitude with which it can "be vindicated," and lays it down that where there is a similarity calculated to deceive, the use may be restrained although the evidence does not show that any purchaser had actually been misled. Cf. *Edelston & Vick*, 18 Jur., p. 7; *Farina v. Silverlock*, 24 L. J. Chy, 632.

Some authorities have been cited with regard to the interpretation of the statute, which are really only applicable to the modern French law. I do not feel that I am called upon to compare our respective systems of Trade-mark legislation. The provisions in this respect of our Criminal Code are taken from the law of England, and the part relating to the fraudulent marking of merchandise is taken almost verbatim from English statutes. It is moreover the universal law of Canada, applying in all of the Provinces, all of which except Quebec are governed by laws derived from those of England and by English decisions for their interpretation. I could not, therefore, in interpreting a statute copied from an English one, consider myself bound by French authorities, where they differ from the English decisions on the same matter. Under the English law, as I have already stated, the question to be decided is whether an incautious or unwary purchaser would be deceived.

Under the circumstances, I see no reason to disturb the decision of the Court below, by which the defendant was convicted, and this appeal is therefore dismissed with costs.

Conviction affirmed.

*L. E. Bernard*, for the appellant.

*T. Brosseau*, counsel.

*C. S. Campbell*, for the respondent.

*M. J. F. Quinn*, Q.C., counsel.

**Notes : Trade-mark—At common law.**

The appropriation of the trade mark of another, apart from any signature therein included, is not forgery at common law, *R. v. Smith*, 1 Dears & B., C.C. 566, 27 L.J.M.C. 225. Nor is it forgery if the signature copied be not upon a document or paper, and therefore an imitation of an artist's signature upon a spurious picture was held not to be an offence at common law, *R. v. Closs*, D. & B. 460, 7 Cox C.C. 494.

***Time for prosecution.***

The prosecution must be commenced within three years from the time the offence was committed. Criminal Code, sec. 551 (a).

***"Without the assent of the proprietor."***

By sec. 710 of the Code it is provided that in any prosecution "for forging a trade mark" the burden of proof of the assent of the proprietor shall lie on the defendant.

This would seem to apply only to cases coming under the definition laid down by sec. 445 as follows :—

Every one is deemed to forge a trade mark who either,—

(a). without the assent of the proprietor of the trade mark, makes that trade mark or a mark so nearly resembling it as to be calculated to deceive ;

(b). falsifies any genuine trade mark, whether by alteration, addition, effacement or otherwise.

If the offence charged be under sub-section (b) of sec. 447 of the Code, for falsely *applying* to any goods any trade mark or any mark so nearly resembling a trade mark as to be calculated to deceive, it would seem to be necessary for the prosecution to negative the assent of the proprietor.

By the corresponding English Act, the Merchandise Marks Act, 1887, 50 & 51 Vict., c. 28, in separate provisoes, the one in respect of forging, and the other as to falsely applying, the onus is placed in both cases upon the defendant (sections 4 and 5).

## [COURT OF QUEEN'S BENCH, QUEBEC.]

CORAM WURTELE, J., IN CHAMBERS.

**IN THE MATTER OF LOUIS LEVI, Petitioner on a  
Writ of Habeas Corpus.***Extradition—Ashburton treaty—Evidence on habeas corpus—  
Identity of prisoner.*

1. Under the Ashburton treaty between Great Britain and the United States of America in 1842, and the convention of 1890, to obtain the extradition of a fugitive charged with the commission of an extradition crime, the same evidence must be given as would justify his committal for trial if the crime had been committed in Canada, and to obtain the extradition of a fugitive who has been convicted of an extradition crime, a duly authenticated copy of the record must be produced and proof of the fugitive's identity must be made.
2. On an application for the extradition of a fugitive, evidence to show that the offence charged is a political one, or that it is not an extradition crime, should be allowed; and if proof be made to that effect the prisoner must be discharged.
3. On a writ of *habeas corpus*, the judge must see, in the first place, whether the offence charged is or is not of a political character, or whether it is or is not an extradition crime, and then whether the proceedings are regular and justify the prisoner's committal for surrender.
4. In the case of a fugitive who has been convicted, the judge does not examine the evidence given at his trial and must not revise the verdict of the jury; his duty is to see if the offence is an extradition crime, if the conviction, after a regular trial, has been duly proved, and if the prisoner has been identified.

Montreal, 9th February, 1897.

WURTELE, J.—

At the instance of the United States of America, proceedings have been adopted for the extradition of one Louis Levi, who is claimed as a fugitive from justice, after having been convicted on the 6th day of November last, before the Court of Sessions of the Peace for the County of Allegheny, in the State of Pennsylvania, of the crime of perjury.

The fugitive was arrested under a warrant issued by Judge Dugas, in his capacity of extradition commissioner, on an information laid before him by one Morris Goldfon, a detective officer of the city of Pittsburg, and after a full enquiry he was committed by the extradition commissioner for

surrender to the United States of America, after the expiration of fifteen days, or, if he should apply for a writ of *habeas corpus*, after the decision of the Court on such writ if it should be adverse to him.

The prisoner has taken out a writ of *habeas corpus* and has been brought before me for the purpose of having a revision of the proceedings which were taken against him on the demand for his extradition, and I have heard his counsel, the counsel for the United States, and also the substitute of the Attorney-General, and I have also examined all the documents produced before the extradition commissioner and the evidence taken by him.

On the 15th day of July last, the prisoner appeared before an alderman of the city of Pittsburg, of the name of John Burns, and laid an information before him to the effect that Samuel Mazer, Marcus Mazer, Henry Mazer, and Joseph Mazer, sons of one Aaron Mazersky, had then and on other days before refused to maintain and support their aged father. On the 21st July last, a trial of the case took place before Alderman Burns, and after having heard the prisoner as a witness, and two other witnesses, the defendants were discharged. After the trial, on the same day, Marcus Mazer, one of the defendants, laid an information against the prisoner charging him with having committed perjury on the 15th day of July, by swearing that he had demanded of the informant contribution for the support of his father, knowing at the same time he made such statement under oath, that such allegation was false and untrue. The prisoner gave bail for his appearance at the September term of the Court of Sessions, and on the 15th day of that month the Grand Jury presented an indictment charging the prisoner with having committed perjury in the suit which I have mentioned, which had been brought by the prisoner against the four sons of Aaron Mazer, alleging that, at the hearing of such suit, it had become necessary and material to enquire of the prisoner whether the sons of Aaron Mazer had, on the 15th day of July last, supported their father, and whether he had demanded of them that they should support their father, and

that the prisoner, having been lawfully sworn by Alderman Burns, who had the power and authority to administer the oath, had falsely and corruptly sworn that the above-named Samuel Mazer, Marcus Mazer, Henry Mazer, and Joseph Mazer, had not supported their father, and that he, the prisoner, had demanded that they should contribute to the support of their father, whereas in truth and fact they had supported their father, and the prisoner had not demanded that they should contribute to his support. The prisoner pleaded not guilty, and, after a regular trial, was found guilty on the 6th day of November last, but before the sentence could be pronounced he escaped from custody and fled to the city of Montreal.

A copy of the indictment and also a copy of the record of the proceedings had at the trial have been produced, and have been duly authenticated. The proceedings for the extradition of Louis Levi are founded on the provisions for the extradition of fugitive criminals contained in the treaty between Great Britain and the United States of 1842, known as the Ashburton Treaty, and in the convention between the two Governments concluded in 1889, and ratified on the 11th of March, 1890. By this convention a number of crimes in addition to those mentioned in the Ashburton Treaty were made extradition crimes, and amongst others, the crime of perjury. The treaty only provides for the extradition of fugitives charged with the commission of extradition crimes, but, in addition to this, it is provided by the convention that the extradition of persons convicted of any of the crimes named and specified in the treaty and in the convention might also be demanded. The Ashburton Treaty provides that, in order to obtain the extradition of a fugitive criminal, it would be necessary to make the same evidence with respect to the accusation brought against him as would be necessary in the country from which his extradition should be demanded to justify his committal for trial, if the crime had been committed there, and article 7 of the convention provides that in the case of a fugitive criminal, alleged to have been convicted of a crime for which his surrender is asked, a copy of the record

of the conviction, duly authenticated, should be produced, and that evidence should be made to prove that the prisoner is the person who was so convicted.

The proceedings respecting extradition from Canada under treaties with foreign countries are regulated by the Extradition Act, Cap. 142 of the Revised Statutes of Canada, and section 11 provides that in the case of a fugitive alleged to have been convicted of an extradition crime, such evidence should be produced as would, according to the law of Canada, subject to the provisions of the act, prove that he had been so convicted, and in the case of a fugitive accused, but not convicted, of an extradition crime, such evidence should be produced as would justify his committal for trial if the crime had been committed in Canada. Section 14 contains a limitation and declares that no fugitive shall be surrendered if it appears that the crime in respect of which extradition proceedings are taken is one of a political character, or that such proceedings are taken with a view to prosecute and punish him for such an offence.

When, therefore, a person alleged to be a fugitive criminal is brought before an Extradition Commissioner, he should admit any testimony that tends to show that the offence is political or that it is not an extradition crime. If it should be found that the offence is of a political character, or that the offence is not an extradition crime, the prisoner must be discharged; but otherwise, if the evidence is such as would justify committal for trial in Canada, or shows that the prisoner has been convicted, it is the duty of the Extradition Commissioner to send the fugitive criminal to jail to await the proper requisition from the foreign Government and the warrant of the Minister of Justice for his surrender.

On the committal of a fugitive to prison, he has the right to apply during a period of 15 days for a writ of *habeas corpus*; and on such writ, if the proceedings are quashed, he is entitled to his discharge, but if they are affirmed he is detained for surrender. If, however, the prisoner is not removed within two months from the time of his committal, if no writ of *habeas corpus* is issued, or from the date of the



decision on a writ of *habeas corpus* when one is issued, he has to be discharged.

My duty in the present case is to see, in the first place, whether the offence is non-political and whether it is an extradition crime, and then whether the proceedings had before the Extradition Commissioner are regular and justify the prisoner's committal for surrender.

It is clear that the offence charged against the prisoner is not one of a political character.

The prisoner's counsel contends that the offence alleged to have been committed by him is not an extradition crime. He says that the act for which he was convicted was for having sworn on the 15th of July last to an information charging that Aaron Mazersky's four children had refused to maintain and support him, and that the evidence produced before the Extradition Commissioner showed that the sum of \$4 a week, which they contributed, was insufficient for his maintenance and support, and consequently that his statement under oath contained no perjury. This applies only to the establishment of the offence, but does not affect the nature of the crime with which the prisoner is charged. On the back of the information alluded to by the prisoner's counsel, we find that the case was tried on the 21st of July, and that the prisoner and two other witnesses were examined under oath. Now, by the information laid against the prisoner by Marcus Mazer, it is alleged that he committed perjury in the information by charging the defendants with neglect of their father and by swearing that he had demanded of the informant contribution for the support of his father, well knowing that such statements were untrue. In the information sworn to by the prisoner the charge, however, is simply that the defendants refused to maintain and support their father, and no mention is made of the other fact,—that he had asked the informant to contribute to the support of his father. This last statement, therefore, must have been made at the trial, and the indictment specially alleges that the prisoner had testified in the suit against Aaron Mazersky's children, and charges that at the hearing of such suit he had falsely and corruptly sworn

that Samuel Mazer, Marcus Mazer, Henry Mazer and Joseph Mazer had not supported their father for a long time, and that he had demanded of them that they should contribute to his support, whereas in truth and in fact they had supported their father for a long time, and the prisoner had not demanded that they should contribute to his support.

It would appear, therefore, that the charge brought against the prisoner by the indictment was not founded on the information laid by him against Aaron Mazersky's children, but on the evidence which he had given at the hearing of the suit brought against them on such information ; and his extradition is required on the conviction which was pronounced against him on the indictment, of which a copy has been produced.

My duty is not to see what evidence was given at the prisoner's trial, is not, in fact, to revise the decision of the jury ; and it was not the duty of the Extradition Commissioner to give to the prisoner what would have been practically a new trial. I have to see only if the crime charged is an extradition crime, that is to say, a crime mentioned in the extradition arrangement between Great Britain and the United States, and of this there can be no doubt. Perjury is one of the extradition crimes mentioned in the Convention, and also in the Extradition Act, and the indictment found against the prisoner charges him with having committed wilful and corrupt perjury.

All I have to do is, in the first place, to see whether due proof has been made of the indictment and of the record of the court establishing the fact that the prisoner was convicted, after a regular trial, on such indictment, and in the next place to see whether the evidence produced has proved that the prisoner is the person to whom such indictment refers, and who was convicted after such regular trial of the crime of perjury.

I am satisfied that the indictment and record have been duly authenticated and proved, that the trial was a regular one, that the prisoner was not convicted by contumacy and that he has been properly identified ; and that the demand for his extradition must therefore be granted.

I, therefore, quash the writ of *habeas corpus* and I order that the prisoner be recommitted to prison for surrender in due course or to be otherwise dealt with according to law.

Writ of *Habeas Corpus* quashed.

*H. C. St. Pierre, Q.C.*, for the petitioner.

*Désiré H. Girouard*, for the United States.

*J. L. Archambault, Q.C.*, Crown Prosecutor.

#### Notes : *Extradition.*

A commitment is good if it follows the form prescribed by the Extradition Act, R.S.C. c. 142. Ex parte *Lanctot*, 5 Q.B., Que. 422.

In Ontario the Court of Appeal was equally divided on the question as to whether it is necessary to shew that the offence with which the prisoner is charged is an offence according to the laws of both countries, Burton, J.A., and Osler, J.A., holding that it was, while Hagarty, C.J.O., and MacLennan, J.A., thought it not necessary to shew that the prisoner was criminally liable according to the law of the demanding country. Re *Murphy*, 1895, 22 Ont. App. 386.

In a case under the treaty between Great Britain and France it was stated by Wills, J., that the substance of the Imperial Extradition Act, 33 & 34 Vict., c. 52, seems to require that the person whose extradition is sought should have been accused in a foreign country of something which is a crime by English law, and that there should be a *prima facie* case made out that he is guilty of a crime under the foreign law and also of a crime under English law. Re *Bellencontre*, 1891, 2 Q.B., 122, 140.

#### *Identity—Evidence of.*

The question of the identity of the person in custody, with the person named in the rendition warrant, is always open to enquiry on *habeas corpus*. This is a different question from whether the fugitive is the person who committed the crime charged in the warrant. The latter is a question of alibi and is to be tried by the courts of the demanding state as a matter of defence. It is only necessary that actual identity

**Notes : (Continued.)**

between the person held and the person named in the warrant be established. Moore on Extradition, sec. 633, cited with approval in *Re Garbutt*, 1891, 21 Ont. App., 465, 472.

## [SUPREME COURT OF BRITISH COLUMBIA.]

BEFORE DRAKE, J.

**THE QUEEN v. CHIPMAN.**

*Municipal law—Offence charged against Police Magistrate—  
Jurisdiction of other Justices over—Summons im-  
proper for inconvenient place of return.*

1. Notwithstanding a statute that no Justice of the Peace shall act as such for a city except in the case of illness or absence or at the request of the Police Magistrate, a Justice of the Peace may act as regards a charge against such Police Magistrate without the latter's request or his illness or absence.
2. For the purposes of a case against a Police Magistrate the statute was held not to apply.
3. The fixing of an inconvenient place for hearing is improper but within the jurisdiction of the Justice of the Peace and therefore not reviewable on motion for prohibition.
4. Any person may institute proceedings in respect of an infraction of a municipal by-law, although the whole penalty goes to the municipal corporation.

An information was laid before a Justice of the Peace against the Police Magistrate for the City of Kaslo for a breach by him of one of the city by-laws, and the Justice of the Peace granted a summons thereon returnable at Nelson.

By section 212 of the Municipal Clauses Act, "No Justice of the Peace shall adjudicate upon or otherwise act in any case for a city where there is a Police Magistrate, except in the case of illness, or absence, or at the request of the Police Magistrate."

Section 213 saves the jurisdiction of Justices of the Peace for the several districts, in regard to offences committed in any city situated within their respective districts in which there

may be no Police Magistrate. The Police Magistrate was not ill or absent and did not request the Justice of the Peace to act.

Motion for an order for a prohibition upon the facts set out, *supra*, upon the grounds, "That there being a Police Magistrate for the City of Kaslo, who is not ill or absent, the said charge could only be properly and lawfully laid and can only be properly heard and determined before such Police Magistrate for Kaslo, aforesaid, or by some other Justice of the Peace at his request, and that such hearing can only be properly and lawfully had at Kaslo, aforesaid, and that the said Elon E. Chipman, being himself the Police Magistrate at Kaslo, aforesaid, refuses to request or consent to the hearing of the said charge before the said John Andrew Forin, or at Nelson, aforesaid, but he has consented and offered to request two Justices of the Peace in and for the said district, resident at Kaslo, aforesaid, and upon the ground that it was not competent to the said G. O. Buchanan to lay the said information or to proceed as on behalf of the City of Kaslo for an infraction of the said by-law or recovery of the penalty."

*Robert Cassidy*, for the motion.

*A. L. Belyea*, contra.

*Cur. adv. vult.*

Victoria, B.C., March 17th, 1897.

DRAKE, J.—

Mr. Cassidy applies for a writ of prohibition to prevent His Honor Judge Forin, who is also a Stipendiary Magistrate, from further adjudicating on the above information.

The facts alleged are that Chipman committed a breach of By-law No. 15 of Kaslo. He is the Police Magistrate and City Clerk of Kaslo.

One Stone, a Justice of the Peace for the district of West Kootenay, residing at Kaslo, on the information of Buchanan granted a summons, returnable at Nelson, against Chipman, and on the return of the summons sundry objections were taken to the jurisdiction. First, that the summons could not issue in consequence of secs. 204 and 212 of the Municipal Clauses Act;

second, that the offence being punishable by a fine the information should be laid by an official of the city; third, that the adjudication, being for a breach of the city by-law, should take place in the city.

By section 81 of the Municipal Clauses Act fines imposed by the by-laws may be recovered by summary conviction before any Justice of the Peace having jurisdiction in the municipality, and by section 82 no Justice is to be disqualified by the fact that the fine goes to the municipality or that the adjudicating Justice is a ratepayer or member of the council.

Section 212 enacts that no Justice of the Peace shall act in any case for a city where there is a Police Magistrate, except in case of illness or absence or at the request of the Police Magistrate. In this case none of the exceptions are stated to have arisen, but the complaint is not for or on behalf of the city, but on behalf of a private person.

The Act authorizes the enforcement of by-laws by a Justice of the Peace; the Police Magistrate cannot act or appoint a tribunal, because he is the offender whose conduct has to be enquired into. In my opinion section 212 does not apply to the circumstances of the present case.

The summons of Mr. Stone, I think, was rightly granted; the place of trial should be within the district where the offence was committed, and it must be within the territorial jurisdiction of the Magistrate; why the trial did not take place at Kaslo is not explained. In summary cases when the hearing is fixed at some place distant from the residence of the defendant, it might result in the denial of justice; but if there is jurisdiction in the Justice who tries the case, this Court will not interfere by prohibition.

The second ground of objection is that the offence was created by a by-law of the municipal council of Kaslo, and therefore must be enforced by the Corporation or some officer, is not a valid objection under section 81, which gives a Justice power to hear a complaint against a breach of a by-law. There is nothing to limit this power to an information laid by or on behalf of the city.

It has to be remembered that the writ of prohibition is a discretionary writ only, and will not be granted unless there is a clear failure of jurisdiction. I am not prepared to say that the adjournment to Nelson by Mr. Stone, though in my opinion improper, was in excess of his jurisdiction, as he was, when issuing the summons, acting within his jurisdiction. Neither am I prepared to say that Mr. Forin, a Stipendiary Magistrate for the Province, when he heard the complaint, was acting without his authority. The motion must be refused with costs.

Motion refused.

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[SUPREME COURT OF NEW BRUNSWICK.]

**Ex Parte DOHERTY.**

*Information—Amendment in absence of accused—Distinct offence—Jurisdiction—Cr. Code 853.*

1. An amendment of a charge of selling liquor to a charge of keeping liquor for sale cannot be made if the accused does not appear at the trial.
2. No such amendment is authorized in respect of proceedings under the Canada Temperance Act, for the magistrate cannot determine in the defendant's absence whether or not the latter has been "materially misled" by the variance (sec. 116).
3. The Criminal Code, sec. 853, authorizing a magistrate to determine the case in the defendant's absence on his default in appearance, must be restricted to the particular charge in the original information and cannot cover a distinct offence.

A rule *nisi* for *certiorari* having been granted to remove a conviction of the applicant, Patrick Doherty, had before Oswell N. Price and Henry Piers, two Justices of the Peace in and for the County of Kings, for unlawfully keeping for sale liquor in violation of the second part of The Canada Temperance Act, on the ground that the Justices had no jurisdiction because the information was for selling, while the conviction was for keeping for sale, which substitution of the offence by amendment was made in the absence of the accused and without his knowledge.

November 8, 1894.

*F. A. McCully* shewed cause.

*A. I. Trueman* supported rule.

*Cur. adv. vult.*

February 6, 1895.

The following judgments were now delivered :

BARKER, J.—

In this case an information was laid against the defendant *for selling liquor* in violation of The Canada Temperance Act. A summons was issued and served on the defendant, but he did not attend. On the return of the summons the Magistrate, having proof of the service, proceeded to hear the evidence in the absence of the defendant. Finding that the proof failed in establishing an illegal sale, but that it did establish an *illegal keeping for sale* within the period mentioned in the information, the Magistrate, on the application of the informant, amended the information by substituting the offence of an illegal keeping for sale for an illegal sale, and then convicted the defendant of this substituted offence. The only question not disposed of in the argument is whether such an amendment can be made in the defendant's absence.

It seems so contrary to all principle that a person charged with a specific offence in an information and summoned to answer that offence, should, at the hearing, and in his absence, be convicted of an entirely different offence, and practically acquitted of the offence which he was summoned to answer, that no Act should be construed so as to bring about such a result unless the provisions were plain and unambiguous. Especially is this the case where the penalties for successive offences are cumulative, and where the penalties prescribed for one class of offence differ from those prescribed for another. It therefore becomes necessary to scrutinize the Act carefully in order to see whether the power to amend is as extensive as contended for in this case. Sect. 116 of the Canada Temperance Act provides for the substitution on the hearing of one offence for another under the



Act by way of amendment, in the event of a variance between the information and evidence in *support of it*, but if it appears that the defendant has been materially *misled by such variance* the Magistrate is to adjourn the hearing of the case to a future day unless the defendant waives such adjournment. I am unable to see how, in the absence of the defendant, and when he is therefore entirely ignorant of the variance between the information and evidence adduced in support of it, the Magistrate can determine whether the defendant has been materially misled by such variance or not. There is no duty cast upon the Magistrate in case of an adjournment to notify the defendant of it, or of the altered position of the case. The adjournment, where the defendant does not appear at the hearing, is therefore of no service to him. I think one would be much safer in assuming that a person charged with one offence and, in his absence convicted of another, is prejudiced, than in assuming that he has not been materially misled by evidence which he has never heard, and which fails in sustaining the offence which he was summoned to answer. Sect. 853 of The Criminal Code is relied on as warranting the procedure. It provides that when the defendant does not appear "such justice may proceed *ex parte* to hear and determine *the case* in the absence of the defendant as fully and effectually to all intents and purposes as if the defendant had personally appeared in obedience to such summons or the Justice may, if he thinks fit, issue his warrant as provided by sec. 560 of this act and adjourn the hearing of the complaint or information until the defendant is apprehended." I think the case which the Magistrate is authorized to go on and determine *ex parte* is the one which the party has been summoned to answer, not a new one altogether.

The offence charged here was an illegal selling and if at the hearing the defendant had not appeared the Magistrate had power in disposing of that charge, or hearing that case, to amend dates or other similar matters connected with that charge, which, in his opinion, would not mislead the defendant as to the offence with which he was charged; though

even in such a case he may have the defendant apprehended and adjourn the hearing until he is actually present, when the whole matter might be fully dealt with. Except for sec. 853 the hearing could not proceed in any case in the defendant's absence ; and, as I read that section, it only applies to the disposal of the particular charge in the original information and authorizes the Magistrate in his discretion to make such amendments at the hearing of that case as may be necessary for fully and effectually hearing and determining it and nothing more. Now it cannot be said to be necessary in order to determine whether the defendant has been guilty of illegally selling liquor, to try him for the offence of illegally keeping it for sale—the evidence in the two cases may be similar, but the offences are entirely distinct.

In *Reg. v. Bennett*, 3 Ont. Rep. 45, it appears that an information was laid for selling, and on the hearing it was amended to a charge of keeping for sale, in accordance with the evidence—a case precisely similar to this. The defendant, however, appeared ; he was present when the amendment was made and entered upon his defence to the amended information. At page 64 of the report the Court says: "The information was not on oath, nor did it require to be and it was amended in the presence of and at the request of the prosecutor and became then in effect a new information. The defendant was not bound to appear to answer it without being duly summoned, but he did so appear and entered upon his defence, and gave evidence and thereby waived the necessity for a summons."

This is an authority for the construction I have placed on the sections in question.

Sections 117 and 118 do not, I think, carry the power of amendment any further. They only apply to cases where the Magistrate has acquired jurisdiction over the person ; but in my opinion he has no jurisdiction over the person unless present, except in regard to the offence charged in the information on which the summons issued.

Tuck, J.—

On the second of January, 1894, Patrick Doherty

was convicted before Henry Piers and Oswald N. Price, Justices of the Peace, in King's County, for keeping intoxicating liquor for sale, contrary to the provisions of The Canada Temperance Act. The information which originally was for selling, was afterwards, in the absence of the defendant, and without notice to him, amended, so that he was charged with keeping for sale, and he was convicted upon the information as amended.

Several points were taken upon the motion for a rule for *certiorari*, but the Court has disposed of them all, except that as to amending the information without notice to the defendant, and in his absence.

I have carefully read the record of the proceedings which took place before the Magistrates in this case. There were several meetings at Sussex, when the defendant, although repeatedly called, did not appear, nor did any one appear for him. On the 29th of December, 1893, at the first Court, held at the lockup in Sussex, King's County, William A. Saunders was sworn, and proved service of summons on Doherty. One of the grounds put forward in moving for a rule in this case was, that there was no proof of the service of summons. The Court thought then, and I think now, that the evidence of service was sufficient, and I think also, that the defendant by a trick, which did not succeed, endeavored to evade service.

At the meeting of the Court, at ten o'clock, a. m., on the 29th of December, Mr. Fred. L. Fairweather (an Attorney of this Court), being present in Court, was called as a witness, and while standing near the Justices, refused to place his hand on the book, or speak, or answer the Court; which conduct, on the part of Mr. Fairweather, I think very reprehensible.

The Court met again at 2.30 o'clock, p.m., when George H. Wallace, Robert Conley, George Hallett, and Hatfield White, who had been summoned to attend as witnesses, did not appear, and the Court had to be again adjourned. The Court met again on the 30th of December, at eleven o'clock, when, the persons, for whom warrants had been issued, not

having been served, the Court was again adjourned until one o'clock the same day. At this time, when the Court met, George Hallett, the witness who had been served with a warrant, came into the Court room, and was asked by the Court to remain and give evidence, but he refused and walked out. The return says, that the Court was repeatedly interrupted by Fred. L. Fairweather, and William Fairweather, who appeared to be advising and tampering with the witness, George Hallett. At this meeting of the Court, George H. Wallace appeared and gave evidence, at the conclusion of which, the counsel for the prosecution moved to amend the information, so that it might read, "Patrick Doherty did keep for sale," instead of "did sell."

The Court took time to consider this motion, and adjourned until Tuesday, the second of January, at eleven o'clock, a. m., then to meet at Hampton. When the Court met on this day, the amendment was allowed, and the defendant was convicted of keeping for sale.

No one can read this record, without being fully convinced that the defendant had ample opportunity of being present at all the meetings of the Court ; that he, or some one acting for him and with his knowledge, from the very time the summons was issued, until the time when the Court was adjourned from Sussex to Hampton, did all in his power to prevent the summons being served, and witnesses being examined, and that he suffered no detriment from the adjournments or any of them, nor from the amendment. Under this state of facts, I think that the defendant has no just cause of complaint, because an adjournment was made from Sussex to Hampton, or because he was convicted of keeping for sale.

The power given to the Justices or Magistrate to amend is ample. By sec. 116, cap. 106, Rev. Stat., (The Canada Temperance Act), in the event of any variance between the information and the evidence adduced in support thereof, the Magistrates may amend or alter the information, and may substitute for the offence charged therein any other offence against the provisions of the Act ; with this proviso, that if

it appears that the defendant has been materially misled by such variance, the Magistrates shall thereupon adjourn the hearing of the case to a future day, etc.

Admitting for the purpose of this case, that the word "variance" is sufficient to cover the change in the information from "selling" to "keeping for sale," how does it appear that he was "materially" or in any way misled? If the amendment was made behind his back, it was so made when he had abundant opportunity, if he had chosen, to be present.

In my opinion the conviction was rightly made, and the rule must be discharged.

LANDRY, J.—

I concur with the judgment of my brother Tuck. The Canada Temperance Act gives power to change one offence to another. There is a discretion in the Justice to make the change. The defendant was served but he did not appear, and he should have known that he was to be tried in the manner that the law prescribes. In abstaining from being present he took all the risk. I think the Justices acted with wise discretion, and I do not think that the law contemplates the defendant being present.

HANINGTON, J.—

I differ from my brothers Tuck and Landry. The offence was for selling and the conviction was for keeping; two different offences. The summons for the first offence gave to the Magistrate jurisdiction over that offence, and that offence only. The power of amendment is given only as to the offence charged and no other. But here we find the defendant convicted of an offence different in sequence and consequence. At the time, indeed at no time, was he personally present; the Justices might have issued a warrant for his apprehension, but did not. They adjourned the hearings but gave no notice to the defendant. As to how reprehensible the conduct of certain parties in Court may have been I express no opinion, but there is nothing to show that they represented the defendant. In my judgment the

law does not contemplate such a variance or amendment in the absence of the accused, therefore I think the rule should be made absolute.

VANWART, J., agrees with Barker and Hanington, JJ.

SIR JOHN C. ALLEN, C.J., not having heard the argument, took no part.

*Rule absolute.*

**Notes :** *Amendment of information.*

Even when the defendant attends, an amendment should not be made which would substitute a different transaction or render it necessary to plead differently. *Perry v. Watts*, 3 M. & G. 775; *Brashier v. Jackson*, 6 M. & W. 549. Nor can an amendment be made by substituting a new party, as a corporation, instead of their officer. *Oxford Tramways Co. v. Sankey*, 54 J.P. 564.

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[SUPREME COURT OF BRITISH COLUMBIA.]

BEFORE DRAKE, J.

**THE QUEEN v. PETERSKY.**

*Municipal law — By-law — Unreasonableness — Conviction — Whether distress necessary before commitment — Sunday observance.*

1. A municipal by-law as to Sunday Observance which exceeds in its prohibition the terms of the provincial law by including classes of persons not included by the latter is too wide in its scope, and is void for unreasonableness.
2. Under the Municipal Clauses Act (Brit. Col.), 1896, s. 81, it is not necessary to issue the distress authorized thereby before issuing a commitment, but the latter course may be taken as an alternative procedure.

The Municipal Clauses Act, 1896, sec. 50, sub-sec. 90, gave to the Council of every Municipality the power to pass by-laws in relation to "Public morals, including the observance of the Lord's Day, commonly called Sunday." The

Municipal Council of Richmond passed a by-law thereunder, "that no person shall do or exercise any worldly labour, business or work of his ordinary calling upon the Lord's Day, or any part thereof, works of necessity or charity only excepted," etc.

Sec. 81 provides: "Every fine may be recovered and enforced with costs, by summary conviction, before any Justice of the Peace, etc.; and, in default of payment, the offender may be committed to the common gaol," etc.

Sec. 81, sub-sec. (2) provides: "The Justice may, by warrant, cause any such pecuniary penalty, etc., if not forthwith paid, to be levied by distress, etc. In case of there being no distress found, etc., the Justice may commit the offender to the common gaol."

The defendant was, for an offence against the by-law, committed to gaol for non-payment of the fine, without previous issue of any distress warrant.

Application for a writ of *certiorari* to quash the conviction:

*A. Williams*, for the applicant.

*C. B. Macneill*, contra.

Victoria, B.C., Aug. 28, 1897.

DRAKE, J.—

This is an application for a writ of *certiorari* to remove the proceedings relative to the conviction of Simon Petersky for breach of a by-law of the Richmond Municipality, being a by-law for the better observance of the Lord's Day, commonly called Sunday. The objections taken to the conviction are several: I. That the by-law does not comply with the provisions of the statute, and the Corporation had no power to pass such a by-law. II. That the Magistrate acted without jurisdiction. III. That the conviction is bad, in that it does not state the amount of the costs payable, and that it does not provide for distress in default of payment. IV. That there is no such by-law as the Sunday Observance By-Law, 1897. The third and fourth objections do not appear in the conviction returned to the court to be well taken. By the Municipal Clauses Act, 1896, sec. 50, sub-sec. 80, the

Municipal Council has power to make by-laws relating to public morals, including the observance of the Lord's Day, commonly called Sunday. Accordingly, the by-law in question was passed, section 2 of which enacts that no person whomsoever shall do or exercise any worldly labour, business or work of his ordinary calling, upon the Lord's Day, or any part thereof, works of necessity and charity only excepted, and no person shall publicly cry forth or expose for sale, or sell, or permit to be exposed for sale or sold, any wares, merchandise, fruit, fish, game, or other goods and chattels whatsoever, on the Lord's Day. Any person guilty of any infraction of this by-law shall, upon conviction, forfeit or pay a sum not exceeding five pounds sterling, or an equivalent in Canadian currency, together with costs of prosecution; and in default of payment of such fine and costs within a time to be named by the Justice, the Justice may commit such a person to the common gaol for any period not exceeding two months, without hard labour, unless the fine and costs are sooner paid. The objection taken by Mr. Williams to this conviction is, that under section 81 of the Municipal Clauses Act, 1896, the limit of imprisonment for non-payment of fine is thirty days, and the Magistrate sentenced the appellant to one month, and, secondly, that the conviction did not provide for distress of the appellant's goods before inflicting imprisonment. As regards the first objection, section 81 only deals with those cases where the by-law makes no other provisions for its enforcement, and the period of imprisonment is limited to thirty days. In such cases here the by-law fixes the maximum of imprisonment at two months, which is not unreasonable. This objection, therefore, fails. The second objection raises a question as to the construction to be placed on section 81 and its sub-sections. Section 81 enacts that, in default of payment of the fine, the offender may be committed to gaol; sub-section 2 provides for awarding the penalty as the Justice thinks fit, and goes on to say that he may by warrant cause the penalty to be levied by distress, and, in case of no sufficient distress, may commit for the term specified in the by-law.



This section 81 is very similar to sections 420, 421, 422 and 423 of the R.S.O., cap. 184 ; and it was held by Galt, J., in *Reg. v. Blakeley*, 6 P.R. 244, that there must be a distress warrant issued prior to commitment. This is an authority to which every respect is due ; but neither the argument nor the reasons are given, and the language of the statutes may differ. In my opinion the section is to be read as relative to separate and distinct courses of procedure ; in the one case imprisonment in case of non-payment of the fine, in the other fine to be levied by distress, and followed by imprisonment in case of insufficient distress. I, therefore, consider these objections to the conviction fail.

It is necessary, therefore, to consider the objections to the by-law itself. The legality of the by-law may be questioned on these proceedings, although no application is made to quash it : see *Reg. v. Osler*, 32 U.C. Q.B. 324 ; *Reg. v. Cuthbert*, 45 U.C. Q.B. 19. The contention of Mr. Williams is that the by-law is unreasonable in that it purports to affect all persons without exception, and would include a minister of religion, farmers and others who are not included in Statute 29 Car. 2 cap. 7. That statute carefully limits the operation of the Act, and is the law of the Province to-day ; and so far as that Act extends, it seems useless for a Municipal Corporation to pass a by-law practically to confirm that which is the law, whether they adopt it or not, and which can be enforced by the ordinary tribunals. The by-law is too wide in its scope and is unreasonable. The conviction must be set aside. Costs are seldom granted when the conviction is quashed, unless it appears the Magistrate has been guilty of conduct which would call for the animadversion of the Court. There is no suggestion here.

Judgment accordingly.

#### Notes :

A comparison of the statute in question in *R. v. Blakeley*, cited, with the above mentioned clause 81 of the British Columbia Municipal Clauses Act, will indicate the different considerations which would apply in the Ontario case. The

**Notes : (Continued.)**

latter was decided under sec. 315 of the Municipal Institutions Act, 1873, 36 Vict. (Ont.) c. 48, and is as follows :—

315. Every fine and penalty imposed by or under the authority of this Act may, unless where other provision is specially made therefor, be recovered and enforced, with costs, by summary conviction, before any justice of the peace for the county, or of the municipality in which the offence was committed ; *and*, in default of payment the offender may be committed to the common jail, house of correction, or lock-up house of such county or municipality, there to be imprisoned for any time, in the discretion of the convicting justice, not exceeding, unless where other provision is specially made, thirty days, unless such fine and penalty, and costs, including the costs of the committal, be sooner paid.

*Certiorari—Costs of quashing conviction.*

If an attack has been made upon the good faith of a magistrate and of the prosecutor and the attack fails, although there were circumstances, afterwards explained, likely to give rise to suspicion, costs of the proceedings to quash should not be awarded, *R. v. Crandall*, 1896, 27 Ont. R. 63, 65.

Costs were refused where the defendant filed no affidavit denying his guilt, or casting doubt upon the correctness of the magistrate's conclusion upon the facts. *R. v. Steele*, 1895, 26 Ont. R. 540.

The Ontario practice is not to give costs on quashing a conviction *R. v. Somers*, 1 Can. Cr. Cas. 46 *ante*.

## [HIGH COURT OF JUSTICE, ONTARIO.]

BEFORE MOSS, J.A., IN COURT.

**THE QUEEN v. BALLARD.**

*Election to be tried by Jury—Re-election—Mandamus to Sheriff to bring the Prisoner before County Judge—Cr. Code 766, 767.*

1. A prisoner arraigned before a County Judge under Criminal Code, secs. 766 and 767, and who thereupon demands a trial by jury and elects not to be tried forthwith by such judge without a jury, has no absolute right after remand to gaol to change the election so made.
2. He has no further option to elect in favor of a speedy trial, although the election made by him was made under mistake.
3. The prisoner's reply upon such arraignment that "for the present" he elected to be tried by a jury is a sufficient election.
4. The sheriff having once given the notice to the judge and brought the prisoner before him, as provided by the Code, sec. 766, is not bound to again do so on notice given by the prisoner that the latter desired to re-elect in favor of a speedy trial.

This was an application for a writ of mandamus directed to the sheriff of the county of Dufferin to bring one David Ballard, a prisoner confined in the county gaol charged with arson, before the County Judge, under section 766 of the Criminal Code, to elect or re-elect whether he would be tried forthwith before the County Judge or demand a trial by jury.

The prisoner had been brought before the Judge and had elected to be tried by a jury and had been remanded to gaol to await his trial. Subsequently he desired to be tried before the Judge instead of by a jury, and he caused a notice to be served on the sheriff that he wished to elect or re-elect to be tried by the Judge, but the sheriff took no proceeding under the notice.

The Criminal Code, 1892, provides:—

766. Every sheriff shall, within twenty-four hours after any prisoner charged as aforesaid is committed to gaol for trial, notify the Judge in writing that such prisoner is so confined, stating his name and the nature of the charge preferred against him, whereupon, with as little delay as possible, such Judge shall cause the prisoner to be brought before him.

767. The Judge, upon having obtained the depositions on which the prisoner was so committed, shall state to him, (a.) that he is charged with the offence, describing it ; (b.) that he has the option to be forthwith tried before such Judge without the intervention of a jury, or to remain in custody or under bail, as the court decides, to be tried in the ordinary way by the court having criminal jurisdiction.

2. If the prisoner demands a trial by jury the Judge shall remand him to gaol ; but if he consents to be tried by the Judge without a jury the county solicitor, clerk of the peace or other prosecuting officer shall prefer the charge against him for which he has been committed for trial, and if, upon being arraigned upon the charge, the prisoner pleads guilty, the prosecuting officer shall draw up a record as nearly as may be in one of the forms MM or NN in schedule one to this Act, such plea shall be entered on the record, and the Judge shall pass the sentence of the law on such prisoner, which shall have the same force and effect as if passed by any court having jurisdiction to try the offence in the ordinary way.

The motion was argued in Weekly Court on May 11th, 1897, before Moss, J.A.

*Rowell*, for the motion. There are two questions arising on this application : (1) Has there been an election ? (2) If there has can the prisoner re-elect ? He may be tried before the County Judge : The Code, sec. 765. The sheriff must notify the Judge that he is confined, the nature of the charge, and cause the prisoner to be brought before him : section 766. The Judge should have the depositions. The evidence shews that he had none and that the prisoner's election was qualified by his using the words "for the present." His consent must be strictly construed : *Whalen v. The Queen*, 28 U.C.R., at pp. 52, 154. He is entitled to re-elect : *Regina v. Prevost*, 4 Brit. Col. R. 326. No wrong will be done to the Crown or any one.

*John R. Cartwright*, Q.C., Deputy Attorney-General, contra. The only use the depositions are to the Judge is to

inform him of the charge, which he was aware of in this case, and no harm is done to the prisoner by their absence. If a prisoner can re-elect once he may any number of times. The law never intended a second election in a case like this, for where it was intended, careful provision is made as in section 769 of the Code. There was no sufficient notice to the sheriff and no request to bring the prisoner before the Judge. In any event there is no legal duty on the sheriff to do so: High on Extraordinary Legal Remedies, 2nd Ed., secs. 7, 9.

*Rowell*, in reply. The form of notice is not material. The rights of the prisoner must be considered: *Regina v. Burke*, 24 O.R. 64. As to a mandamus to the sheriff, see High, 2nd ed., sec. 133.

May 13th, 1897. Moss, J.A.—

The applicant is confined in the common gaol at Orangeville, to which he was committed on the 29th January, 1897, under four warrants of commitment to stand his trial upon charges of arson preferred against him.

On the 2nd of February, being brought by the sheriff of the county before the Judge of the County Court and being asked by the Judge to elect whether he would be tried summarily before him or before a jury, he answered (according to the statement in his affidavit) that "for the present" he elected to be tried before a jury, and he was thereupon remanded to gaol.

He says that, at the time, he was under the belief that he would be at liberty later to change his election and consent to be tried by the Judge without the intervention of a jury, if he was so disposed or advised.

He says he is now desirous of being tried by the Judge instead of by a jury, and on the 6th instant, he caused the sheriff of the county to be served with a notice that he desired to elect or re-elect to be tried by the County Judge, at his Criminal Court, on the charges for which he was committed for trial to gaol. The notice contained no demand upon the sheriff to bring the applicant before the County

Judge for the purpose stated in it, and it is not shewn to have been accompanied by any such demand.

Nothing having been done by the sheriff in response to this notice, the applicant now moves for an order directing the issue of a writ of mandamus to the sheriff, requiring him to bring the applicant before the County Judge, to give him an opportunity to elect or re-elect to be tried before the said Judge without a jury, or to be tried by a jury, and on the argument the right to the order was put upon two grounds : 1st, that there had been no election ; 2nd, that if there was an election, the applicant is entitled to withdraw the election made, and now consent to be tried by the County Judge without the intervention of a jury.

The evidence does not make it clear when the applicant finally concluded to submit to be tried by the County Judge.

The delay between the 2nd of February and the 6th of May is attributed in part to the difficulty in procuring copies of the notes of the evidence taken at the investigation before the magistrate.

It was stated on the argument that although the investigation before the magistrate was concluded about the 26th of January last, copies of the notes of evidence which were taken by a stenographer were not procurable until the 4th instant.

Upon the argument, Mr. Rowell for the applicant, stated that notwithstanding anything alleged in the affidavits as to the cause of the delay in the extension and handing out of the stenographer's notes of the evidence, he was now satisfied it was not attributable to the Attorney-General's department.

The application being for a mandamus against the sheriff, and being resisted on his behalf, as well as on behalf of the Crown, on the ground, among others, that there is no remedy in this case by way of mandamus, it is necessary, having regard to the office of a mandamus, and the circumstances under which it is ordered to issue, to see what duty, if any, the sheriff is bound to perform, which the applicant has a legal right to ask the Court to enforce performance of,

for the existence of a legal right or obligation is said to be the foundation of every writ of mandamus. I will assume, for the present, that the service of the notice on the sheriff, on the 6th instant, was a sufficient demand, although, upon the authorities, I am inclined to the opposite opinion. I will also assume that the delay creates no difficulty. The applicant was, on the 29th of January last, committed by the magistrate to, and he has ever since been confined in, the common gaol of the county of Dufferin, at Orangeville.

It does not appear whether the sheriff, within twenty-four hours after the committal, notified the County Judge in writing as required by section 766 of the Criminal Code, or whether a longer period elapsed before the Judge was notified.

At all events, on the 2nd of February, the applicant was brought before the Judge, and, as stated in his affidavit, was asked "to elect whether I should be tried summarily before him or by a jury." I take this to amount to a statement that the Judge informed the applicant that he had the option to be forthwith tried before him without the intervention of a jury, or to remain in custody or under bail, to be tried in the ordinary way by the Court having criminal jurisdiction.

No record of the proceedings before the Judge has been produced or shewn on this application, but it is stated by Mr. McKay, the County Crown Attorney, who represented the Crown upon the occasion, that the applicant elected to be tried by a jury. It is clear he did not then consent to be tried by the Judge without a jury, and he appears to have been remanded to gaol—the appropriate procedure where a prisoner demands a trial by jury.

Upon the material before me I must conclude that the applicant being committed to gaol for trial and the sheriff having notified the County Judge in writing that the applicant was so confined, stating the nature of the charges against him, the County Judge caused the applicant to be brought before him, and that upon the matters set forth in section 767 of the Code being stated to him by the Judge the applicant demanded a jury and was thereupon remanded to gaol.

It is true he states in his affidavits that his statement to the Judge was that "for the present" he elected to be tried by a jury. I can only regard this as a demand for a jury and it was evidently so treated by the Judge.

It does not appear to me that a prisoner upon being brought before a Judge under these sections of the Code is driven to decide immediately as to what he shall do. I see nothing to hinder him from asking for delay or to prevent the Judge from granting it in a proper case. Here there was no request for delay to enable the applicant to decide how he shall determine the option given him. The proceedings terminated in a remand to the gaol, evidently for the purpose of awaiting trial by a jury.

Under the circumstances I do not see my way to granting the relief sought on this application.

I do not see that there is any duty imposed upon the sheriff of again notifying the Judge with regard to the applicant or of taking any steps for bringing him again before the Judge in order that the latter may once more state to the applicant the matters set forth in section 767.

The sheriff's part was performed when he notified the Judge in the first instance. The Judge having pursuant to the notification caused the applicant to be brought before him, and having remanded him, the applicant must, if he is advised that he is still at liberty to withdraw his demand for a jury and elect to be tried before the County Judge, adopt some course other than that taken on this application.

I am unable to conclude that the sheriff is under an obligation or duty, or that the applicant has a right upon request, or notice, to the sheriff to require him, to now bring the applicant before the County Judge for the purposes sought. And unless it is the sheriff's plain duty to do this without the agency of a mandamus, it should not be ordered to issue against him.

Mr. Rowell strongly contended that even admitting that the applicant had elected to be tried by a jury he was still entitled to abandon that election and consent to be tried by the County Judge without the intervention of a jury, and the



case of *Regina v. Prevost*, 4 Brit. C.R. 326, was referred to. If I had to determine this question I should require further time to consider the matter. I am not at present convinced that a prisoner, who, being brought before the County Judge demands a trial by jury and is thereupon remanded to gaol, is entitled as of right to afterwards drop the demand for a jury and insist upon being again brought before the County Judge in order that he may consent to be tried by him without the intervention of a jury. The applicant claims that his election was made under a misapprehension or mistake as to his position at the time. If there was any mistake it did not occur through the agency of the sheriff and he is not responsible for it. Relief from the effect of the election, if any is to be obtained, must, I think, be sought for in some other form of application. I do not at present determine anything as to these questions.

I decide this application upon the grounds above indicated. The application must be refused.

**Notes:** *Right to re-elect.*

It had been held by Crease, J., in *R. v. Prevost*, 1895, 4 Brit. Columbia Rep. 326, that a prisoner who has elected to be tried by a jury may afterwards re-elect in favor of a speedy trial before a judge under sec. 766 of the Criminal Code, there being nothing in the Act to prevent it, and its *ratio existendi* being speedy trial.

It was also said that the practice in British Columbia had been to allow a re-election, and a similar practice prevails in many Ontario counties.

The *Prevost* case was upon a motion to the court for leave to abandon the election made, and to be allowed to re-elect, and such would seem to be the proper practice. On such an order being made, the court would have inherent jurisdiction over the sheriff as its officer to direct him to produce the prisoner. The latter is under the jurisdiction of the court which has seizin of his case. *R. v. Prevost*, 1895, 4 B.C.R. 326, 329.

The sheriff is to notify the judge of the "nature of" the

**Notes : (Continued.)**

charge, and the latter is not confined to a consideration of the charge as set forth in the language of the sheriff's certificate or of the warrant of commitment, but is to obtain the depositions on which the prisoner was committed, and is to state to the prisoner the offence with which he is there charged. *Cornwall v. The Queen*, 1872, 33 U.C.R. 106, 119.

The purpose of the section is that the prisoner should be tried on the charge upon which he is held in any form in which the charge could properly be laid against him ; and the record may be framed so as to state the offence charged in such form as the depositions or evidence shewed that it should have been laid, although laid with different counts and in different forms to meet the facts of the case, so long as it does not contain different distinct offences. *Cornwall v. The Queen*, 1872, 33 U.C.R. 106, 121.

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[SUPREME COURT OF BRITISH COLUMBIA.]

BEFORE WALKEM, J.

**THE QUEEN v. STRAUSS.**

*Statute creating offence—Exemption from—Proviso or exception—Negating—Game Protection Act (Brit. Col.) 1895.*

1. The existence of an exception nominated in the description of an offence created by statute must be negated in order to maintain the charge.
2. If a statute creates an offence in general terms with an exception by way of proviso in favour of certain persons or circumstances, the onus is on the accused to plead and prove himself within the proviso.
3. The generality of the prohibition contained in the statute (sec. 7) against purchasers having in possession with intent to export, causing to be exported, etc., game, etc., is not to be limited by inference to game killed within the Province.

Case stated, the subject fully appearing from the judgment.

*G. E. Powell*, for the Crown.

*F. B. Gregory*, for the accused.

Victoria, B.C., June 19, 1897.

WALKER, J.—

This is an appeal, brought in the form of a case stated at the instance of the prosecutor, from a dismissal by the police magistrate of Victoria, of a charge laid against the accused for having 777 deer skins in his possession for export purposes, contrary to sec. 7 of the "Game Protection Act, 1895," as amended by sec. 3 of the Game Protection Amendment Act, 1896. The section reads as follows: "No person shall at any time purchase or have in possession, with intent to export, or cause to be exported, or carried out of the limits of this Province, or shall at any time or in any manner export, or cause to be exported or carried out of the limits of this Province, any, or any portions of the animals or birds mentioned in this Act," (deer are so mentioned) "in their raw state: Provided that it shall be lawful for any person having a license under section 20 of this Act to export, or cause to be exported or carried out of the Province, the heads, horns and skins of such animals mentioned in section 21 of this Act, as shall have been legally killed by such license-holder: Provided that the provisions of this section shall not apply to bear or beaver, marten or land otter."

The license mentioned in section 20 is a license to the holder, during the shooting season for which it is issued, to kill a limited number of deer and other animals that are specified in sec. 21. By sec. 16, the Act is not to be "construed as prohibiting any resident farmer from killing, at any time, deer that he finds depasturing within his cultivated fields; and by sec. 17 its provisions are not to apply to Indians of this Province, or to settlers in the Province, with regard to any game killed for their own immediate use for food only, and for the reasonable necessities of the person killing the same, and his family, and not for the purpose of sale or traffic, or to free miners actually engaged in mining or prospecting, who may kill game for food, provided they are not mining at a camp where boarding-houses are maintained; or to the Curator of the Provincial Museum,

or his assistants, while collecting specimens for the Museum. At the close of the case for the prosecution, the charge against the accused was dismissed in view of the observation made by the learned Chief Justice in *Regina v. Boscovitz*, 4 B.C. 132, to the effect that it was the duty of the prosecution in such cases to severally negative the exemptions contained in the proviso of sec. 7, and in secs. 16 and 17, and also the fact that the hides were those of animals killed beyond the boundaries of the Province, and, therefore, beyond the reach of the Act. The only question referred to the learned Chief Justice in that case was the constitutionality of the Act; hence the observations referred to were merely *obiter dicta*; but, as the learned Magistrate based his judgment upon them, I must deal with them.

In *Simpson v. Ready*, 12 M. & W., at page 740, Baron Alderson observes: There is a manifest distinction between a proviso and an exception. If an exception occurs in the description of the offence in the statute, the exception must be negatived. But if the exception comes by way of proviso, and does not alter the offence, but merely states what persons are to take advantage of it, then the defence must be specially pleaded, or may be given in evidence under the general issue, according to circumstances. For instance, if in the present case sec. 7 had read thus: "No person, not being an Indian, farmer, settler, free miner, or holder of a license under section 20 hereof, shall at any time purchase or have in his possession with intent to export the same, the whole, or any portion of any animals or birds mentioned in this Act, in their raw state," the prosecution would have been obliged to negative the exception, or in other words prove that the accused was neither a farmer, Indian, settler, free miner, or license-holder, as the exception would obviously in such a case be part of the description of the offence; but as the exceptions in the Act as it stands, are by way of proviso as in sec. 7, and as distinct enactment as in sec. 17, the defence should have pleaded, and proved, that the accused came within one or other of them, if such was the fact. In *Charter v. Greame*, 13 Q.B. 227, Lord Denman

observed: "The distinction may be between an exception and a proviso; the distance between the enacting part cannot be very important." In *Regina v. Bryan*, 2 Str. 1101, a conviction under sec. 1 of 9 Geo. II., Cap. 23, for selling liquor without a license, was held to be good without an averment that it was not to be used medically, as that exception was in a separate section by way of proviso, *e.g.*: "Provided always that this act shall not extend to physicians, etc." I have taken this reference from *Regina v. Nunn*, 10 P.R., at p. 397.

The language of sec. 7 is quite clear. Mere possession of deer skins in their raw state with intent to export them, subject to the qualifications mentioned in the Act, constitutes an offence. Possession, in the present case, for export purposes, having been admitted, it only remained for the prosecution to satisfy the magistrate that the skins were in their raw state, but although the prosecution gave evidence to that effect, evidence to the contrary which was preferred by the defence was not heard, as the magistrate considered that, in view of the *dicta* in *Regina v. Boscovitz*, which I have mentioned, no offence had been proved. What is meant by the skin in its "raw" state is a matter to be determined by the magistrate, for I intend to remit this case to him for a re-hearing. The word "raw" would seem to be used in contradistinction to tanned or dressed.

Again, the learned Chief Justice's opinion to the effect that such skins, if obtained from places beyond the Province, would not be within the Act, is contrary to the decision of the Court in *Price v. Beadley*, 16 Q.B.D., 148. That case was one upon the 11th section of the "Fresh-water Fisheries Act, 1878," which in general terms prohibits the sale or exposure of fresh-water fish during the close season. The Act only applies to England, but it was nevertheless held to apply to fish offered for sale in Birmingham although they had been caught in Ireland. The language of Mathew, J., who delivered the judgment, is as follows: "The question is whether this provision is to be construed as applicable only to fish caught in that portion of the United Kingdom to

which the Act applies (namely, England). I think not. The words of the section do not of themselves import any such restriction of its applicability, and I can conceive of excellent reasons why it should not be so restricted. A difficult and troublesome enquiry might often be necessary to ascertain whether the fish were caught in England or imported from elsewhere, and this might tend to defeat the object with which the enactment was made. For these reasons I think the conviction must be affirmed."

It seems to have escaped the attention of all parties, both in the Magistrate's Court and in this Court, that the "Dominion Customs Tariff Act, 1894," which I have examined, prohibits the export of deer and deer skins, for sec. 16 says: "The export of deer, wild turkeys, quail, partridge, prairie fowl and woodcock, in the carcase or parts thereof, is hereby declared unlawful and prohibited; and any person exporting or attempting to export any such article shall for each such offence incur a penalty of one hundred dollars, and the article so attempted to be exported shall be forfeited, and may on reasonable cause of suspicion of intention to export be seized by an officer of the Customs, and, if such intention is proved, shall be dealt with as for breach of the Customs laws; Provided, that this section shall not apply to the export, under such regulations as are made by the Governor-in-Council, of any carcase or part thereof of any deer raised or bred by any person, company or association of persons upon his or their lands." Again, by section 43 of Stat. Can., 51 Vic., Cap. 14, (another of the Customs Acts) the onus of proof is shifted, and the accused required to prove his innocence in such a case as the present. What the effect of these sections is upon the provisions of the Game Protection Act which I have been considering, it is not for me to decide, as the question of the constitutionality of the latter Act forms no part of the case stated. I mention the sections as they refer to the alleged offence, and cannot therefore be disregarded, and especially so as it may be held that they override our own legislation in respect to exportation. The case requires to be re-heard, and for that purpose

is remitted, together with this opinion upon it, to the Police Magistrate. See Criminal Code, sec. 900. I make no order as to costs.

*Case remitted to Magistrate.*

**Notes :**

The same distinction is pointed out in *R. v. Nunn*, 1884, 10 Ont. Pr. 395, cited in the principal case. The Nunn case was under a municipal by-law prohibiting the playing of musical instruments or creating noises calculated to disturb the inhabitants, and the enactment of the by-law was immediately followed by a proviso as follows :—

“ Provided always, that nothing therein contained shall prevent the playing of musical instruments by any military band in Her Majesty’s regular army, or any branch thereof, or of any militia corps lawfully organized under the laws of Canada.” It was intimated that such was not to be considered an exception in the enacting clause, but as an exception by way of proviso and it was held to be unnecessary to negative it in either the commitment or conviction.

But where a conviction for selling liquor on a Sunday omitted to state that the liquor was not supplied upon a requisition for medicinal purposes, it was held bad where the prohibitory enactment was immediately followed by the words following, “ save and except in cases where a requisition for medicinal purposes, signed by a licensed medical practitioner, or by a justice of the peace is produced by the vendee or his agent.” *R. v. White*, 1871, 21 U. C. C. P. 354 ; 32 Vict. (Ont.) c. 32, s. 23.

## [HIGH COURT OF JUSTICE, ONTARIO.]

BEFORE MEREDITH, C.J.C.P., ROSE, J., AND MACMAHON, J.

## THE QUEEN v. WALSH.

*Construction of statute—"Sale or other disposal"—Liquor License Act (Ontario).*

1. Generic words following specific words are not restricted in their primary meaning because preceded by the word "other."
2. The words "sale or other disposal" in a license statute regulating hotels are to be construed as including a gift.
3. Under the Ontario Liquor License Act the licensee cannot lawfully give away liquor on the licensed premises on Sunday or other prohibited time for business, although the gift be made privately to a friend and in a private room.

The Liquor License Act (Ont.), R.S.O. 1887, c. 194 (now R.S.O. 1897, c. 245) provides :

54. (1) In every place where intoxicating liquors are authorized to be sold by wholesale or retail, no sale or other disposal of such liquors shall take place therein, or on the premises thereof, or out of or from the same, to any person or persons whomsoever from or after the hour of seven of the clock on Saturday night till six of the clock on Monday morning thereafter, . . . , save and except in cases where a requisition for medical purposes signed by a licensed medical practitioner, or by a Justice of the Peace, is produced by the vendee or his agent ; nor shall any such liquor, whether sold or not, be permitted or allowed to be drunk in any such place during the time prohibited for the sale of the same, except by the occupant or some member of his family, or lodger in his house.

This was a motion to quash a conviction by the police magistrate at Ottawa who had convicted the defendant of "disposing of" intoxicating liquor on a Sunday.

The evidence shewed that defendant was a licensed hotel-keeper, and had treated two of his friends in a room of his hotel, other than the bar-room, on a Sunday.

The magistrate found that the liquor was given to the friends, that there was no request from them for it, and that



there had been no sale of it, or disposal in the nature of a sale.

The motion was made on December 15th, 1897, to a Divisional Court, composed of MEREDITH, C.J., ROSE and MACMAHON, JJ.

*Haverson*, for the motion, contended that the treating, or gift of the liquor by the landlord, was not a "disposal" under the section; that the word "disposal" as there used means in the nature of a sale, and that "to give" is not covered by the words "to sell."

That the words "sale or other disposal" are not sufficient to take from the licensee the right which every other person enjoys of entertaining his friends at his own expense. That if the conviction is right then the defendant could not allow his private guest wine at his own dining-table. He referred to *Petherick v. Sargent* (1862), 6 L.T.N.S. 48, and *Overton v. Hunter* (1860), 1 L.T.N.S. 366.

*Langton*, Q.C., supported the conviction, and contended that "disposal" in the expression "sale or other disposal" is intended to have a wide meaning, and included every "disposal" whether gratuitous or otherwise (section 109), which is not a "sale." That the intention was that there should be no evasion of the law by acts which were equivocal, and he referred to R.S.O. ch. 194, secs. 54, 57, 59, and schedule D. form 5, *Anderson v. Anderson* (1895), 1 Q.B. 749; *Regina v. Hodgins* (1886), 12 O.R. 367; Stroud's Dictionary, 543.

December 16th, 1897. MEREDITH, C.J.—

The word "disposal" in the section must be taken in its ordinary sense, and a gift is certainly a disposal. In the section in question that word is preceded by the word "other," plainly shewing that while a "sale" is a "disposal," a disposal other than a sale is to be guarded against. The object and policy of the section is, that places where liquor is licensed to be sold are to be kept closed during the prohibited hours, and if the contention of the defendant is

to prevail, that object would be defeated and the section be almost useless. I think the conviction should be affirmed.

ROSE, J.—

I agree with the judgment just delivered.

Where specific words are followed by generic words the latter are to be understood in their primary and wide meaning, and the words "other disposal," must be construed as covering such a gift as that in question: Maxwell's Interpretation of Statutes, 2nd ed., 413. The language of the ordinance in question in the case of *State of Minnesota v. Gustav Deusting* (1885), 33 Min. 102, was similar to that used in our own statute. There the conviction was sustained.

MACMAHON, J.—

I also quite agree, and think that the language used in sections 57 and 59 of the Act is *in pari materia*, and that they must not necessarily be construed so as to prevent the giving away of liquor under the circumstances there mentioned.

**Notes :** *Proof of license.*

The fact that the premises are licensed must be proved by the prosecutor in order to sustain a conviction for selling on a prohibited day. *Regina v. Williams*, 8 Man. R. 342, 12 C.L.T. 282; *Regina v. Duquette*, 9 U.C.C.P. 28; *Regina v. French*, 34 U.C.R. 403.

Where, however, the charge is in respect of any Act in respect of which, were the accused not a license-holder, he would be liable to a penalty under the Act, the onus of proving that he is duly licensed, and that he did the said act lawfully, is placed upon the defendant by sec. 114 (1) of the Ontario Liquor License Act (R.S.O., 1897, c. 245).

The English statute 37-38 Vic. (Imp.), c. 49, s. 30, expressly excepts from the prohibition the *bona-fide* entertainment of private friends at the landlord's expense, but a strict interpretation is placed upon the term "private friends" sufficient to prevent an easy evasion of the law. *Corbett v. Haigh*, 5 C.P.D. 50.

**Notes :** (*Continued*).

Where the general words following the particular words are in themselves inclusive of the words preceding, the rule is to construe them as referring to persons or things, *ejusdem generis* with those previously enumerated. *Sandimon v. Breach*, 7 B. & C. 100; *Kitchen v. Shaw*, 6 A. & E. 729; *R. v. East London*, 21 Eng. L.J. 49.

The words "or otherwise" following the words "orders for payment of money" have been held to comprise all kinds of orders, *Morant v. Taylor*, 45 Eng. L.J. 78, 40 J.P. 101, giving effect to the presumed intention and object of the Act as overriding the rule of construction as to a class *ejusdem generis*. The latter rule, however, was upheld as to the word "place" following the words "house, office or room" in the English Betting Act. *Powell v. Kempton Park Co.*, 1897, 2 Q.B. 242, C.A. (Compare *Hawke v. Dunn*, 1897, 1 Q.B. 579.)

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[COURT OF QUEEN'S BENCH, MANITOBA.]

BEFORE KILLAM, J.

**THE QUEEN v. EGAN.**

*Summary Trial with Consent—Conviction—No Right of Appeal—Cr. Code, 783 (a), 808.*

1. An appeal does not lie from the decision of a police magistrate who tries a charge of theft summarily with the consent of the accused.
2. Cr. Code, sec. 808, prevents the application of any of the provisions as to appeals from summary convictions, (secs. 879-884,) to convictions under Part LV., (secs. 782-808.)
3. A police magistrate will not be compelled by mandamus to take a recognizance for the prosecution of an appeal from a summary conviction made on a trial before him had with the consent of the accused.

ARGUED : 4th March, 1896.

DECIDED : 5th March, 1896.

Application for a mandamus to a police magistrate to take a recognizance on an appeal. Prisoner had been convicted

of theft under section 783, sub-section (a), of the Criminal Code, 1892.

*R. L. Ashbaugh* for the prisoner.

*H. A. McLean* for the Crown cited *Reg. v. Justices of London*, 17 Cox C. C. 526.

KILLAM, J.—The question is whether a party convicted under part LV of the Criminal Code, 1892, by a police magistrate, has a right of appeal.

Section 808 directly excludes an appeal under sections 879-884. It provides that "The provisions of this Act relating to preliminary inquiries before Justices, except as mentioned in sections eight hundred and four and eight hundred and five, and of Part LVIII, shall not apply to any proceedings under this part:" This is badly expressed and wrongly punctuated, but evidently it prevents the application of any of the provisions of Part LVIII, in which are found the sections as to appeals from summary convictions, to convictions under Part LV. This is made more clear by reference to the French version of the Act, and to R.S.C. c. 176, s. 34, from which the clause is taken, and which prevented the application of The Summary Convictions Act to proceedings under The Summary Trials Act.

The case to which Mr. McLean has referred, *Reg. v. The Justices of London*, 17 Cox C. C. 526, appears to show that under the circumstances there is no right of appeal. Except under the clauses of Part LVIII, no Court in Manitoba is given authority to entertain an appeal from a conviction by a magistrate.

Application for mandamus dismissed.

**Notes :** *Summary Trial by Consent—No Right of Appeal.*

Under somewhat similar sections of the English Summary Jurisdiction Act of 1879, the practice was that there should be no appeal.

In *R. v. Justices of London*, 1892, 17 Cox C. C., 526, 528, Lawrance, J., says the result is "that the person who consents to be dealt with summarily, makes a bargain with the

**Notes: (Continued).**

magistrate that he will leave the decision of the case to him, instead of having the case tried by a jury. It has been argued that it is a great hardship for the defendant if he cannot appeal, as he does not know at the time of giving his consent what it is he is consenting to. But this is obviated when we remember that it is the duty of the magistrate to cause the charge to be read over to the defendant and to ask him if he desires to be tried by a jury or if he consents to the case being dealt with summarily, and then the section says that the magistrate is to explain the meaning of the case being dealt with summarily."

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[HIGH COURT OF JUSTICE, ONTARIO.]

BEFORE ARMOUR, C.J.Q.B., FALCONBRIDGE, J., AND  
STREET, J.

**THE QUEEN v. COULSON.**

(24 ONT., R., 246.)

*Conviction—Uncertainty in—Amendment—Practising medicine  
—Meaning of—Ontario Medical Act—Certiorari—Costs.*

1. A conviction for unlawfully practising medicine without being registered under The Ontario Medical Act is bad, unless it specifies the particular acts constituting the alleged "practising".
2. A conviction bad on its face for uncertainty should be amended by the Court to which removed by *certiorari*, only when such Court can conclude on the evidence that an offence is thereby proved.

The Ontario Medical Act R. S. O., 1897, c. 176 s. 49 (R. S. O. 1887, c. 148 s. 45) provides that: "It shall not be lawful for any person not registered to practise medicine, surgery, or midwifery for hire, gain or hope of reward; and if any person not registered pursuant to this Act, for hire, gain, or hope of reward, practises or professes to practise medicine, surgery, or midwifery, or advertises to give advice in medicine, surgery, or midwifery, he shall upon a summary conviction thereof \* \* for any and every offence, pay a penalty not exceeding \$100 nor less than \$25.

On the 10th April, 1893, the defendant was summarily convicted before the police magistrate for the city of Toronto, "for that he, the said F. W. Coulson, in the month of March, 1893, at the city of Toronto, in the County of York, not being registered pursuant to the Ontario Medical Act, for hire, gain, and hope of reward, unlawfully did practice medicine contrary to the form of the statute," etc., and was adjudged to pay a fine of \$100, or be imprisoned for thirty days unless that sum should be sooner paid.

A writ of *certiorari* having been issued, the magistrate returned the conviction, information, and the evidence taken before him. The only witness for the prosecution was one William Boyd, who swore that on the 27th March, 1893, he went to 24 Macdonell Avenue, in the city of Toronto, and saw the defendant there. He had previously seen an advertisement and written a letter to the defendant. He asked the defendant if he was the doctor, and the latter said yes. The defendant looked for and got the witness's letter. The defendant said he supposed the witness wanted to be doctored, and the witness said he did. The defendant asked the witness what was the matter with him, what his symptoms were, and said he should take treatment "8 c." The defendant gave him some medicine, for which he paid him \$7. On cross-examination the witness said: "I told the defendant that I had the gleet. He said my disease came under treatment '8 c.' I agreed to pay him \$12 for his services. He said my medicine was very careful medicine to mix, and that it would not be ready for some time, but he would send it to me."

The defendant was a witness on his own behalf, and said that he remembered witness Boyd; that he got his letter, and sent him a book and a price list of medicines. Boyd called at 24 Macdonell Avenue and asked if that was Mr. Lubon's. The defendant said his name was Coulson, and that he was agent for Lubon's specifics. Boyd asked him for a package of his "8 c" treatment. The defendant told him that he shipped all medicines from his down town office; did not prepare him any medicine, because they were all prepared

at a wholesale druggist's in Toronto, or shipped from Philadelphia already compounded. Cross-examined, the defendant said that he was not a doctor, and did not tell Boyd he was; he did not tell Boyd that it would take some time to prepare the medicine; he was in the habit of selling his proprietary medicines, but he did not prescribe for people.

May 19, 1893. *Aylesworth, Q.C.*, obtained a rule *nisi* from the Queen's Bench Divisional Court, to quash the conviction, upon the ground that the evidence did not shew that the defendant practised medicine, and that upon the evidence the defendant had not committed or been guilty of any offence whatever prohibited by the Ontario Medical Act, or otherwise.

November 27, 1893. *Aylesworth, Q.C.*, supported the rule before the full Court (ARMOUR, C. J., and FALCONBRIDGE and STREET, JJ.). The evidence discloses no offence. What the defendant did was not practising medicine. [ARMOUR, C. J. —Can we interfere on that ground?] If there is absolutely no evidence, the Court can quash the conviction. If the case were being tried with a jury, the trial Judge, if there were no evidence, would not allow it to go to the jury. If there was no evidence before the magistrate which would be evidence to go to a jury, the Court should quash the conviction. I refer to *Regina v. Stewart*, 17 O. R. 4. I also take exception to the conviction on the ground that no wrongful act is specified in it. All that is said is that the defendant practised medicine. I refer to *Regina v. Somers*, 24 Ont. R. 244, decided this term, and *Regina v. Spain*, 18 O. R. 385. Also, there must be more than one act to constitute practising: *Apothecaries Co., v. Jones*, [1893] 1 Q. B. 89; *Re Horton*, 8 Q. B. D. 434.

*H. S. Osler*, for the informant. Under *Regina v. Hall*, 8 O. R. 407, this was clearly practising medicine. It was a case of professional knowledge exercised with a view to selling medicine. It was what would be called in England practising as an apothecary, and that our Act forbids. I refer to *Apothecaries Co. v. Nottingham*, 34, L. T. N. S. 76, and the definition of "apothecary" in Wharton's Law Lexicon.

*Aylesworth*, in reply, referred to *Woodward v. Ball*, 6 C. & P. 577.

At the close of the argument the judgment of the Court was delivered by

ARMOUR, C. J.—

We think we cannot uphold the conviction. We do not proceed upon the ground that there was no evidence of an offence. Where the conviction is valid on its face, we are not to look at the evidence for the purpose of determining whether an offence is established by it. That is a matter for the magistrate, and for the appellate court where there is an appeal: see *Regina v. Wallace*, 4 O. R. 127. The conviction here is bad because it does not specify the particular act or acts which constituted the alleged practising of medicine. We have no statute such as they have in England, saying that the words of the statute shall be sufficient. In *Regina v. Spain*, 18 O. R. 385, and *Regina v. Somers*, this term, we quashed the convictions on this ground. *Regina v. Spain* was founded on *Re Donnelly*, 20 C. P. 165. This conviction is, therefore, bad on its face; but the magistrate had jurisdiction, and we ought, therefore, to look at the evidence to see if an offence was committed; and if so, we should amend the conviction. But, looking at all the evidence, we cannot come to the conclusion that an offence was committed of the nature specified in the conviction; we cannot hold that what the defendant did on the occasion in question was practising medicine within the meaning of the statute. The conviction will, therefore, be quashed.

*Aylesworth, Q.C.*, asked for costs against the informant.

ARMOUR, C. J.—

The practice is not to give costs, as we had occasion to say the other day in *Regina v. Somers*. In *Regina v. Hasen*, 23 O. R. 387, we gave costs against the informant, but that was under peculiar circumstances.

*Rule absolute without costs. No order for protection.*



**Notes : Conviction—Certiorari—Review of finding.**

In a subsequent case of *The Queen v. Coulson*, the same defendant, coming before Meredith, C.J.C.P., and Rose, J., in 1896 sitting for the Common Pleas Division, dissent was expressed from the judgment above reported of the Queen's Bench Divisional Court. In the opinion of the Common Pleas Judges the evidence should be looked at, when the proceedings are removed by *certiorari*, in order to see if there was any evidence whatever to sustain the magistrate's finding, even if no defect appeared on the face of the conviction ; and if there was *any* evidence of that character the Court should not review *all* the evidence or find as to the propriety of the magistrate's conclusion. *Regina v. Coulson*, 1896, 27 Ont. R. 59.

## [SUPREME COURT OF NEW BRUNSWICK.]

**Ex Parte BISHOP.***Convictions for two offences—Imprisonment—Time—Not concurrent unless stated.*

1. A prisoner convicted at the one time of two offences and sentenced on each to three months imprisonment without specification as to the terms being concurrent or otherwise, is not entitled to a discharge on *habeas corpus* after three months imprisonment.
2. There is no presumption that sentences passed at the one time are to be concurrent.

November 6, 1895.

The applicant had been convicted, at the one time, of two offences against the second part of The Canada Temperance Act: 1st for selling liquor contrary to the Statute ; 2nd for keeping it for sale, and it was adjudged that in default of the payment of the fines imposed, or distress, that he be imprisoned in the common goal of the County of Westmoreland for the space or time of three months for each offence. Having served one term, he applies to Mr. Justice Landry for an order in the nature of a writ of *Habeas Corpus*, who

granted the same, and afterwards referred the matter to the Court. The principal ground relied upon for his discharge was: That the justices not having stated that the second sentence was to commence at the expiration of the first, they ran concurrently.

*R. B. Smith*, for applicant.

*Jordan, Q.C.*, contra, not called upon.

SIR JOHN C. ALLEN, C. J., and VANWART, J., took no part.

*Referred back to Mr. Justice Landry  
to refuse the order.*

**Notes :** *Punishment—Concurrent or cumulative sentences.*

The general rule is, that imprisonment is to be reckoned from the time when the prisoner was actually lodged in gaol. Ex parte *Foulkes*, 15 M. & W. 612; *Henderson v. Preston*, 1888, 21 Q.B.D. 362.

In cases coming under the Criminal Code, 1892, it is specially provided (sec. 954) that, when an offender is convicted of more offences than one, before the same court or person at the same sitting, or when any offender, under sentence or undergoing punishment for one offence, is convicted of any other offence, the court or person passing sentence may, on the last conviction, direct that the sentences passed upon the offender for his several offences shall take effect one after another.

## [COURT OF QUEEN'S BENCH, QUEBEC.]

CORAM WURTELE, J., IN CHAMBERS.

**Ex Parte LON KAI LONG, alias LONG WING; TOM HOP LEE; AND HUM CHUNG LUNG.***Commitment—Unauthorized conditions of discharge—Quashing warrant—Laundry license by-law.*

1. The precept of a warrant of commitment must conform strictly to the directions of the statute which authorizes an incarceration, with respect to the conditions upon which a prisoner can obtain his discharge before the expiration of the term to which he has been condemned.
2. When the authorizing statute states that a person who is condemned to a term of imprisonment in default of the payment of a fine and costs, can obtain his discharge before the expiration of such term upon the payment of the fine, it is illegal to require in addition the payment of the costs of the prosecution and of the charges of his conveyance to prison.
3. In such case the warrant of commitment is bad and illegal, not only as regards the part in which such costs and charges are mentioned but in whole, and must be quashed.

Montreal, 16 August, 1897.

WURTELE, J.—

The council of the City of Montreal is authorized by the 6th section of the statute of the province of Quebec, 59 Vict., ch. 46, which amends the charter of the city, to impose and levy a special annual tax not exceeding \$100 on each public laundry doing business in the city; and under the provisions of section 86 of the charter (52 Vict., ch. 79) the council is allowed to impose and levy such special annual tax in the form of a license to be taken out annually at such time and under such conditions and restrictions as may be determined.

Under the power thus conferred on the corporation, the council of the city passed a by-law, on the 27th April, 1896, imposing a special annual tax of \$50 upon every public laundry doing business in the city; and ordained that such tax should be levied in the form of a permit or license, and should be payable annually on the 1st May.

Section 141 of the charter empowers the council of the

city to impose, for every infraction of any of its by-laws, either a fine not to exceed \$40, with or without costs, or an imprisonment not to exceed a period of two calendar months, and when a fine is imposed, with or without costs, to order an imprisonment not to exceed such period of two months in default of immediate payment of such fine and costs. But the section granting this power enacts that where imprisonment is ordered in default of the payment of the fine it shall cease before the expiration of the term decreed on payment of such fine being made. In order to be discharged from imprisonment, the law only declares that the fine should be paid, and does not demand the payment in addition of any costs or other charges.

In the by-law imposing the special annual tax of \$50 on public laundrie, the council of the city included a clause, under the power conferred by section 141 of the charter, imposing a fine not to exceed \$40 upon all persons keeping public laundries in the city who should neglect to pay the tax, and take out the necessary license, and ordering that in default of immediate payment of the fine and costs, such offenders should be liable to an imprisonment not to exceed a period of two calendar months, but with the condition that the imprisonment should cease upon the payment of the fine and costs. It will be seen that the enactment of the by-law exceeds, however, the provisions of the authorizing statute, for the latter only requires the payment of a fine for a prisoner to be discharged from imprisonment, whereas the by-law calls for the payment of the costs awarded as well.

The petitioners were all sued before the Recorder's Court for keeping public laundries in the city of Montreal without having taken out the license to that effect and without having paid the special annual tax of \$50. Lon Kai Long, who had been sued under the name of Long Wing, and Tom Hop Lee, were severally condemned on the 11th September, 1896, to pay a fine of \$40 with \$2 for costs, for their infraction of the by-law imposing the special annual tax, and in default of immediate payment to be imprisoned for two months, unless the tax and costs and the charges for conveying them to the

common jail should be sooner paid; and Hum Chung Lung was condemned, for the same reason, on the 27th October, 1896, to pay a fine of \$10 with \$1.95 for costs, and in default of immediate payment to be imprisoned for one month, unless he should sooner pay the tax and costs and the charges for his conveyance to jail.

All three have complained that their incarceration is illegal, and they are now before me on writs of *habeas corpus*.

They allege that the warrants of commitment, under which they are severally detained, are in excess of the power conferred on the corporation of the city, inasmuch as such warrants command the keeper of the common jail to keep them imprisoned for the period mentioned in their respective convictions, unless the fines and costs which they have severally been condemned to pay, and also the further sum of \$1.50 each for the cost and charges for conveying them to the common jail be sooner paid, whereas, by law, no authority is given to detain them upon such conditions. I have to see if their pretension is well founded.

The by-law which imposes the fine, and imprisonment in default of its payment and of the payment of the costs incurred, enacts that such imprisonment shall cease at any time before the term fixed by the Court upon payment of the fine and costs, but it says nothing about the cost and charges for the conveyance of the offender to the prison. But this ordainment exceeds the enactment of the empowering statute, which only requires for the discharge of the prisoner the payment of the fine alone. The warrants of commitment therefore exceed in one particular the condition upon which the prisoners should be discharged under the by-law—namely, by requiring the payment of \$1.50 for their conveyance to jail—and in two particulars the condition under the statute from which the authority to imprison is derived—namely, by demanding, in the first place, the payment of the costs, and in the next place that of the cost and charges for conveying them to the common jail.

Laws which impose penalties are subject to a strict construction, and the punishment and all its incidents must

be mentioned in clear and unambiguous language; they must be established by positive enactment, and cannot be gathered from implication, and still less by conjecture. Statutes which give costs in penal proceedings are likewise to be construed strictly, inasmuch as such costs are an increment of the penalty. In laws imposing penalties and allowing costs in penal proceedings, the rule is that the construction most beneficial to the offenders must be adopted.

All laws which effect the life or the liberty of a subject are to be interpreted in this manner. Endlich says, (in No. 339):—"It is required by the spirit of our free institutions that the interpretation of all statutes should be favorable to personal liberty."

One of the incidents of the punishment by imprisonment, in consequence of the failure to pay the fine and costs, is a mode of obtaining a discharge before the expiration of the full term of the imprisonment, and this, according to the exact words of the statute authorizing the imprisonment, consists merely in the payment of the fine imposed.

It may be suggested, however, that the legislature intended to include the costs with the fine, and meant that both should be paid in order to be liberated; but whenever there is any doubt as to the meaning of the words used by the legislature the benefit of the doubt must be given to the subject when his liberty is in question. Using the words of Endlich, (in No. 339):—"Where an equivocal word or ambiguous sentence leaves a reasonable doubt of its meaning which the canons of interpretation fail to solve, the benefit of the doubt should be given to the subject and against the legislature which has failed to explain itself." Of the two constructions,—whether the prisoner can obtain his liberty by the payment of the fine alone, or whether it is necessary that he should pay both fine and costs,—which is to prevail? I will let Endlich answer this query. He says (in No. 330):—"Where a statute admits of two constructions, that which operates in favor of life or liberty is to be preferred." The words of the statute are that an offender who is imprisoned for having neglected to pay the fine and costs may be

discharged from his imprisonment upon the payment of the fine, and certainly the construction most favorable to an offender's personal liberty is that the payment of the fine alone is all that is required for him to be discharged and regain his liberty.

Paley, in speaking of the condition upon which a prisoner can obtain his release, says: "The time for which a party is committed, and the condition upon which he is to be discharged, must strictly conform to the directions of the statutes from which the authority is derived." (Summary Convictions, p. 349).

Now let us apply this principle to the present cases. The condition mentioned in the statute from which the authority for the imprisonment of the petitioners is derived, to enable them to be liberated before the expiration of their term of imprisonment, is the payment of the fine, but the injunction to the jailer contained in the warrants of commitment, instead of strictly conforming to this direction of the statute, exceeds it to the disadvantage and prejudice of the petitioners, by requiring in addition to the payment, without authority, of the costs and of the cost and charges for the conveyance to the prison. This addition is, therefore, illegal and bad. Paley tells us that "if a commitment be bad in part, it is, in most instances, bad *in toto*. Where a party was committed until he paid two several sums of money, one of which was not due, the court quashed the commitment altogether." Here, of three sums mentioned in the commitments, two are not due as regards the condition on which liberation can be obtained, and being bad in this respect the commitments are bad in whole.

Section 173 of the charter of the city enacts that the provisions of chapter 178 of the Revised Statutes of Canada respecting summary proceedings before justices of the peace apply to the Recorder's Court as regards the mode of proceedings in prosecutions to conviction and the execution of such convictions. Where an offender is imprisoned in default of payment of a fine this act requires the payment not only of the fine, but also of the costs of the prosecution and of the cost and charges for conveyance to jail, in order to be

discharged before the term of the imprisonment has expired. But it is specially ordained that the provisions of this act only apply when they are not inconsistent with the provisions of the charter, and when no express provision is made in it in relation to the procedure to be followed. Now, section 141 contains an express enactment respecting execution by imprisonment in default of the payment of a fine for the infraction of a by-law which is inconsistent with the provisions in that regard of the Act respecting summary convictions, and its provisions do not, therefore, apply in the present cases; its provisions are controlled and superseded by the special provisions contained in the charter.

I consequently declare the commitments to be irregular, bad, and illegal, and I quash them; and I order the keeper of the common jail of the district of Montreal to discharge and free the petitioners.

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The formal text of the order on the writ of *habeas corpus* in the case of Lon Kai Long alias Long Wing, is as follows (The other two are the same):—

“Upon reading the return to within writ, and after hearing the petitioner by his counsel, Mr. H. C. St. Pierre, Q. C., and Mr. Odilon Desmarais, the Crown Prosecutor for the district of Montreal, on behalf of the Attorney-General for the Province of Quebec, I, the Honorable Jonathan S. C. Wurtele, one of the judges of the Court of Queen's Bench for Lower Canada, do declare and adjudge the commitment under which the petitioner, Lon Kai Long, alias Long Wing, is detained and kept, to be irregular, bad, and illegal, inasmuch as the conditions mentioned therein upon which he can obtain his release do not conform to the directions of the statute authorizing his incarceration, and I consequently quash the commitment, and order the keeper of the common jail of the district of Montreal to discharge and free him from further custody.”

Commitment quashed.

*H. C. Saint Pierre, Q.C.*, for the petitioners.

*Odilon Desmarais*, Crown Prosecutor, for the Attorney-General.



## [SUPREME COURT OF NEW BRUNSWICK.]

**Ex Parte NUGENT.**

*Conviction—Unauthorized penalty added—Amendment—Review of finding—Discretion to allow certiorari—Alternative right of appeal.*

1. Where the only penalty authorized has been imposed, but with an unauthorized addition, the latter may be struck out on amendment after its return under *certiorari*.
2. The court should not amend a conviction if in doing so it has to exercise the discretion of the magistrate.

An order *nisi* for *certiorari* was granted by Mr. Justice Tuck to remove a conviction had against the applicant, Henry Nugent, before William E. Skillen, Parish Court Commissioner for the Parish of Saint Martins in the City and County of Saint John, for selling liquor contrary to the provisions of the Liquor License Act, 1887, and adjudging that in default of payment of a fine of \$50, or sufficient distress, the defendant should be imprisoned in the County gaol of the City and County of Saint John for two months, with hard labor; the principal ground being that the Commissioner had no power to adjudge hard labor for a first offence.

November 8, 1894, *L. A. Currey, Q. C.*, showed cause.

*R. LeB. Tweedie* supported the rule.

*Cur. adv. vult.*

Saint John, N.B., February 6, 1895.

The following judgments were now delivered :

TUCK, J. On the twenty-fifth day of September, 1894, Henry Nugent was convicted before William E. Skillen, Commissioner of the Parish of Saint Martins Civil Court, for having unlawfully sold liquor without a license, and contrary to the provisions of the Liquor License Act, 50 Vic. cap. 4 (1887), Acts of Assembly. And being convicted he was adjudged to pay a fine of fifty dollars, and in default of payment to be imprisoned for the space of two months. In

the conviction, under the Magistrate's hand and seal, the defendant, Henry Nugent, in default of payment or sufficient goods upon which to levy by distress is adjudged to be imprisoned in the common gaol of the City and County of Saint John, there to be kept at hard labor for the space of two months.

An order *nisi* for a *certiorari* was granted on several grounds, only one of which it is necessary to consider; namely, that the conviction in adjudging hard labor does not follow the minute of adjudication, and further that there is no authority in law to impose hard labor.

In shewing cause against the order *nisi*, Mr. Currey admitted that the conviction is bad, in the particulars named, but claimed that the Court has power to amend. He argued also that under the provisions of the Chapter (four) *certiorari* is absolutely taken away, and that the defendant should have appealed to the Judge of the County Court for Saint John.

When application was made to me, at Chambers, for an order *nisi*, I called Mr. R. LeB. Tweedie's attention to the fact that the Liquor License Act provides for an appeal to the Judge of the County Court of the County in which the conviction is had, and that no conviction affirmed or amended and confirmed on appeal by the Judge shall be quashed for want of form or be removed by *certiorari* into any of the Courts of Record. The point was discussed, and finally it was thought that if Mr. Tweedie proved to be right in his contention that the Magistrate acted without jurisdiction in imposing the penalty of "hard labor," then the Court would entertain his motion for a *certiorari*, notwithstanding the sections relating to appeal.

In a word that it is discretionary with the Court to say whether or not a *certiorari* ought to go in this case. I am still of the opinion that there is nothing in the Statute to prevent the Court from exercising its discretion as to granting or refusing a *certiorari*.

In *ex parte Roy*, 27 N. B. Rep. 202, the Court held, that when on an information under the Liquor License Act of 1887, the Justices exceed their jurisdiction, the conviction may be

brought up by an order for review. In the judgment of the Court the Chief Justice says: "We think the intention of sections 117 and 118 is to take away a *certiorari* except where there is want of jurisdiction." The 12th sub. sec. of sec. 118 seems to be conclusive on this point. It enacts that no conviction in respect of which there has been no appeal, shall be removed by *certiorari* into either the Supreme or County Court, when the convicting Magistrate had authority or jurisdiction to make such conviction. Therefore, I take it, if there has been no appeal, and the Magistrate had no authority or jurisdiction to make the conviction it may be removed into this Court by *certiorari* and dealt with, as if no provision had been made in the Act for an appeal to the Judge of the County Court of the County where the conviction was had.

Then as to the conviction itself: It is certainly bad in awarding hard labor, for there is no such penalty for the offence charged; and the conviction must be quashed, unless it ought to be amended.

I think this conviction ought not to be amended, for the penalty imposed is greater than the Act authorizes, and no power is given to this Court by the Statute to amend the conviction, where the Magistrate acted without jurisdiction, or in excess of his jurisdiction. If the defendant had actually been confined in gaol upon this conviction he must have been discharged if brought up upon a writ of *habeas corpus*. No amendment of the conviction could have prevented his discharge. In *Regina v. Rose*, 22 N. B. Rep. 309, the Court held that under sections 117 and 118 of the Canada Temperance Act, 1878, the Court has no power to amend the conviction, when the penalty imposed is greater than the Act authorizes, but such conviction is invalid. *Regina v. Perley*, 25 N. B. Rep. 43, is an authority for quashing a conviction where it is at variance with the minute of adjudication. I can find no authority for amendment, where the Magistrate has imposed a penalty not authorized by the Statute.

I think, therefore, that the conviction is bad; that there

is no power to amend it; and the rule for a *certiorari* must be absolute.

BARKER, J.—This was an application for *certiorari* to remove into this Court a conviction made by the Parish Court Commissioner of Saint Martins, on the 25th day of September last, by which Nugent was convicted of unlawfully selling liquor without a license, in violation of "The Liquor License Act, 1887." It appears by the minute of conviction that Nugent was fined \$50 and costs and in default of payment he was to be imprisoned in gaol for two months. The conviction varies from the minute by adjudging the defendant in case of non-payment of the fine and costs, to be imprisoned in the gaol of Saint John *there to be kept at hard labor* for two months, unless the fine and costs were sooner paid.

Sec. 82 of "The Liquor License Act, 1887," provides that any person convicted of selling liquor without license shall for a first offence incur a penalty of \$50 and costs. It is only for a third offence that imprisonment with hard labor is a substantive punishment, but in the case of a first offence imprisonment is merely a means of enforcing payment of the fine and costs, and in such cases it is not accompanied with hard labor, (sec. 139.) The conviction is therefore clearly wrong. This was practically admitted at the argument, but it was contended that the remedy was by way of appeal under sec. 117, but if not, then the conviction was amendable under sec. 110, of the Act. I shall not consider the first point as in my opinion the conviction can be amended under sec. 110. It provides as follows: "No conviction or warrant for enforcing the same, or any other process or proceeding under this Act, shall be held insufficient or invalid by reason of any variance between the information or summons and the conviction, or of there being no information, or by reason of any other defect in form or substance, provided it can be understood from such conviction, warrant, process or proceeding, that the same is made for an offence against some provisions of this Act within the territorial jurisdiction of the Justice, Justices or Magistrate, who made

or 'signed the same, and provided that it can be understood from such conviction, warrant or process, that the appropriate penalty or punishment for such offence was intended to be adjudged." The section then goes on to provide that the Court on any application to quash such proceeding shall dispose of it on its merits and may make all necessary amendments.

At the argument *Reg. v. Rose*, 22 N. B. Rep. 309, was referred to as an authority against the power to amend. That was a case under The Canada Temperance Act, 1878, and by reference to sections 117 and 118 of that Act, it will be found that there is a difference between that Act and the Liquor License Act in the conditions subject to which the power to amend exists. Amendment has been allowed in several cases by this Court : *Ex parte Russell*, 25 N. B. Rep. 437 ; *Reg. v. Dewar*, 30 N. B. Rep. 248 ; *Ex parte Conway*, 31 N. B. Rep. 405, may be cited as illustrations. Sec. 110 of the Liquor License Act seems to have been copied from a similar Act in force in Ontario, and the Courts in that Province have in several cases been called upon to construe the concluding proviso of the section, and in some of these cases the defect sought to be amended was the same as in this case. The difficulty arises in judicially understanding from the conviction that the appropriate penalty or punishment for the offence was intended to be adjudged. In *Reg. v. Lake*, 7 P. R. 235, Wilson J., amended the conviction by striking out the words, "with hard labor." In *Reg. v. Black*, 43 U.C.Q. B. 180, the Court refused to make a similar amendment. *Reg. v. Hartley*, 20 O. R. 481, and *Reg. v. Brady*, 12 O. R. 358, may be referred to as illustrating the difficulties in the way of amending an adjudication.

Much of the discussion in these cases arose from the fact that the convicting Magistrate had a discretion as to the penalty and in some cases as to the mode of enforcing it. There does not seem to be serious difficulties in such cases in the way of amending an adjudication, because in doing so the Court is exercising the discretion instead of the Magistrate. Suppose, for instance, in this case the Magistrate

had power to adjudge a penalty *not* exceeding \$50, and he had actually fined the party \$10 and also imprisoned him for ten days with hard labor. The latter part of the adjudication would be unauthorized, but I see many objections to amending the conviction by striking that clause out by way of amendment. In such a case it is clear that the Magistrate did not think a fine of \$10 an appropriate punishment because he imposed imprisonment in addition, whereas if he had known that he could not legally imprison, he might have increased the fine up to the limit of \$50. To simply strike out the imprisonment clause in such a case would be making the Magistrate exercise a discretion which in fact he never did exercise. When, however, you come to deal with a case where the Magistrate has no such discretion all this difficulty seems got rid of. It must be assumed in all cases that the Magistrate intended doing his duty, and where not only the appropriate penalty, but the only penalty which the Act fixes in such a case has been imposed, I myself find no difficulty in understanding that the appropriate penalty was intended, simply because the Magistrate, from ignorance or inadvertence, added imprisonment with hard labor to the fine. In this case the minute of conviction is all right, and in order to make the conviction correspond with the minute as it should, I see no objection to making the amendment. It is, I think, within the principle of *ex parte Conway* and *Reg. v. Dewar* already cited.

I think the *certiorari* should go to bring up the conviction as was done in *ex parte Conway*, and if the conviction returned contains the clause as to hard labor, it can be amended by striking it out.

HANINGTON, LANDRY and VANWART, JJ., concurred with BARKER, J.

SIR JOHN C. ALLEN, C. J., not having heard the argument, took no part.

*Rule absolute, to bring up the conviction for amendment.*

**Notes: Conviction—Amendment of.**

When the magistrate has exercised his judgment or discretion, and has nominated the fine and fixed the term of imprisonment, both being within his discretion, the formal conviction must follow the adjudication, because it must be in accordance with the fact. In order to vary the fine or the imprisonment, where such discretion exists, it would be necessary to have a new adjudication, which would be in effect a new judgment, and could only be changed by the magistrate in the presence of the defendant. *Regina v. Hartley*, 1890, 20 Ont. R. 481, 485; *Regina v. Brady*, 12 Ont. R. 358.

A conviction which varied from the minute of adjudication in omitting to provide for payment of the costs and charges of the distress, in the event of the defendant being imprisoned for non-payment, may be amended if the costs of the distress are not in the discretion of the magistrate. *Ex parte Conway*, 1892, 31 N.B.R. 405.

**Costs.**

Costs of *certiorari* proceedings are not usually given where the conviction is amended and affirmed in the amended form. *R. v. Higham*, 7 El. & Bl. 557.

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[SUPREME COURT OF THE NORTH-WEST  
TERRITORIES.]

BEFORE WETMORE, J., ROULEAU, J., AND McGUIRE, J.

**THE QUEEN v. WILSON.**

*Jurisdiction — Liquor License (N.W.T.) Ordinance — Two Justices—Criminal Code, 842.*

1. The Canada Criminal Code applies to prosecutions under the Liquor License Ordinance (N.W.T.), 1891-92, for the enforcement of penalties thereunder.
2. The hearing of the charge under that Ordinance must be before two Justices of the Peace except where otherwise provided by the Ordinance itself.

The defendant was convicted by one Justice of the Peace for selling liquor without a license.

An appeal was taken to the Hon. Mr. Justice Richardson who referred the same to the Court in banc.

The question referred was whether a single Justice of the Peace had jurisdiction to hear and convict of the offence charged.

Regina, N.W.T., Dec. 4, 1894.

*Hamilton, Q.C.*, for the prosecutor.

*T. C. Johnstone* for defendant.

The judgment of the Court was delivered by WETMORE, J.

WETMORE, J.—

Mr. Justice Richardson must be advised that a single Justice of the Peace had not the power of hearing and convicting for an offence such as that set out in this case.

Section 105 of the "Liquor License Ordinance," 1891-92, provides that informations or complaints for offences under that Ordinance shall be laid or made before a Justice of the Peace.

But section 106 provides that "such prosecution may be brought for hearing and determination before any *two* Justices of the Peace."

Section 120 provides in effect that the provisions of the Act of Parliament relating to Summary Convictions shall apply to all prosecutions under the Ordinance so far as the same are not inconsistent with the Ordinance. Consequently the provisions of "The Criminal Code" relating to Summary Convictions are applicable for the enforcement of penalties under the Liquor License Ordinance in so far as they are not so inconsistent.

Section 842 of the Code provides that "Every complaint and information shall be heard, tried, determined and adjudged by one Justice or two or more Justices as directed by the Act or law upon which the complaint or information is framed. . . . (2) If there is no such direction in any Act or law then the complaint or information may be heard, etc., by any one Justice."

As pointed out, the Liquor License Ordinance directs that the prosecution may be brought before two Justices,



and except in some special instances, which I will refer to, there is no other direction upon the subject, therefore prosecutions under the Ordinance, unless otherwise specially directed or authorized, must be heard and determined by two Justices. There are no special provisions allowing the prosecution for the offence charged against the defendant to be heard by one Justice. There are, however, offences under the Ordinance which may be heard by one Justice, see section 69, sub-section (a), sections 85 and 86, consequently there are provisions to fill the words "the Justice or Justices" in section 112 and several other sections of the Ordinance.

ROULEAU, J., and MCGUIRE, J., concurred.

Judgment accordingly.

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[COURT OF QUEEN'S BENCH, MANITOBA.]

BEFORE TAYLOR, C.J.

**THE QUEEN v. CAVELIER.**

*Judicial proceedings on Sunday—Invalidity—Committal by Magistrate for trial—Cr. Code 564, 729.*

1. The conduct of a preliminary inquiry before a magistrate is a judicial proceeding which cannot be legally done on Sunday, notwithstanding Cr. Code, sec. 729.
2. Sec. 729 Cr. Code is to be applied only to matters before a jury.
3. Proof by affidavit is admissible in habeas corpus proceedings to show that the commitment took place on a Sunday, as proving an extrinsic fact in confession and avoidance of, but not contradicting the return.

ARGUED : 7th October, 1896.

DECIDED : 9th October, 1896.

This was a summons to show cause why a writ of Habeas Corpus should not issue for the discharge of Edouard Cavelier, a prisoner committed to the Western District gaol, under a magistrate's warrant, for trial at the next court of competent jurisdiction, on a charge of stealing twenty bags of wheat. Upon obtaining the summons, an affidavit of the prisoner was filed, alleging that he was arrested late in the

evening of Saturday, the 26th of September, 1896, and shortly thereafter taken before Harris H. Barnes, a Justice of the Peace for the County of Brandon, who, without his consent, began the preliminary inquiry into the charge made at two o'clock in the morning of Sunday, the 27th of September, and proceeded with such inquiry continuously until it was finished soon after daylight on the same morning, when a warrant of commitment was made out and he was the same day conveyed to gaol; that he had no opportunity of obtaining counsel or advice, nor of obtaining the attendance of witnesses on his behalf, although he expressed a desire to do so; that he was not offered an opportunity of giving evidence on his own behalf, but was called upon to answer questions put by the magistrate; that he was arrested in the Municipality of Winchester, and the inquiry held by the magistrate in that municipality, which did not form a portion of the County of Brandon; and that his counsel was unable to see a copy of the depositions, as they had not, up to the time of making the affidavit, been returned by the magistrate to the proper officer at the City of Brandon. Annexed to the affidavit was a properly verified copy of the warrant of commitment, which, after reciting that "Edouard Cavelier" had been charged, &c., commanded the constable to take "the said Charles Cavelier" and convey him to gaol, and also commanded the gaoler to receive "the said Charles Cavelier" into his custody, &c. This warrant was dated 27th September, 1896, and signed "Harris H. Barnes, J.P. for the County of Brandon."

Upon the return of the summons, after an enlargement at the request of the Crown, in order to communicate with the magistrate, which, however, was found impracticable owing to the distance, the Crown admitted that the prisoner was detained under the warrant, a copy of which was annexed to his affidavit. An affidavit was also filed stating that Harris H. Barnes was, at the time he committed the prisoner, and for a long time prior, a Justice of the Peace for the Province of Manitoba: and that it appeared on the original depositions that at the preliminary inquiry a man

named Edouard Cavelier was sworn and gave testimony apparently on behalf of the prisoner, and that deponent would gather from the depositions that such witness was the prisoner.

*H. E. Crawford, Q.C.*, for the prisoner, moved the summons absolute, taking four objections to the regularity and legality of the proceedings :—(1) In holding the preliminary inquiry, Barnes acted as a Justice of the Peace for the County of Brandon, and the warrant of commitment shows he was so acting, but the inquiry was held and made in the Municipality of Winchester, which forms no part of the County of Brandon, so that he had no jurisdiction : *Reg. v. Row*, 14 U.C.C.P. 307 ; *Hunt v. McArthur*, 24 U.C.R. 254. (2) The warrant is directed to the keeper of the common gaol at Brandon, and not to the keeper of the Western District gaol, the only gaol to which the prisoner could be committed. (3) The warrant orders "Charles Cavelier" to be taken and detained, but Edouard Cavelier, the present applicant, is the person detained under it. (4) The preliminary inquiry, which resulted in the applicant's committal, was held, and the warrant was signed upon a Sunday, but the inquiry was a judicial act, and having been held upon a Sunday it was void, and therefore there is nothing to uphold the warrant : *Re Cooper*, 5 P.R. 256. Section 729 of the Criminal Code, deals solely with the verdict of a jury, and the corresponding English Act was passed in consequence of what fell from the judge in *Reg. v. Winsor*, 10 Cox C.C. 280.

*H. A. Maclean* for the Crown. The jurisdiction of the magistrate cannot be attacked ; he was a Justice of the Peace for the Province, appointed under the statute which makes it lawful for the Lieutenant-Governor to appoint justices for the whole Province ; as such he had jurisdiction in any and every part of it. The words "for the County of Brandon," are mere surplusage, and should be disregarded. The second objection has on a former occasion been dealt with by the Full Court, which held a warrant addressed to the keeper of the common gaol at Winnipeg sufficient, there being only one common gaol there : *Reg. v. Holden*, 3 M.R. 579. The error

in the name is not a matter to be considered on a habeas corpus ; it is not important. The warrant speaks of " the said Charles Cavelier," and " the said Cavelier," would have been sufficient. There is no evidence which can be looked at that the inquiry was proceeded with on a Sunday ; the affidavit is not evidence ; the depositions have not been brought before the Court by certiorari as they should have been : *Hurd on Habeas Corpus*, 353. The warrant is the only thing which can be looked at, and it is regular : *Hurd on Habeas Corpus*, 332. The offence is one over which the magistrate had jurisdiction and showing detainer under legal process is sufficient. The warrant is one issued under the Criminal Code, and by section 564, sub-section 3, every warrant authorized by that Act may be issued on a Sunday.

TAYLOR, C. J.—

What evidence is there before me on this application at which I can look? Can the prisoner's affidavit be read as evidence, or must my attention be confined to the warrant of commitment under which the Crown admits he is held.

In *Bacons Abr., Habeas Corpus*, B. 3, it is said that, although upon the habeas corpus, and the return thereof, the Court can judge of the sufficiency or insufficiency of the return and commitment, as the case appears upon the return, yet they cannot, upon the bare return of the habeas corpus, give any judgment or proceed upon the record of the indictment, order or judgment, without the record itself be removed by certiorari. In *Reg. v. Douglas*, 7 Jur. 39, it was held that, on a motion to discharge a party brought up by a writ of habeas corpus, affidavits suggesting matters which, though not repugnant to the return, show the custody to be illegal, are not admissible. The case of *The Sheriff of Middlesex*, 11 A. & E. 273, in which Lord Denman, C. J., said that, on a motion for a habeas corpus, there must be an affidavit from the party applying, but the return, if it discloses a sufficient answer, puts an end to the case, was one in which the release was sought of two persons held in custody by the Sergeant-at-Arms of the House of Commons for a contempt and breach of the privileges of the House.

In *Church on Habeas Corpus*, s. 287, after the statement that it has been said there is nothing properly before the Court upon the return of a habeas corpus except the warrant upon which the applicant is imprisoned, it is added: "On the return to a writ of habeas corpus issued to inquire into the cause of detention, after commitment by a magistrate, and before indictment, additional proof may be received by the judge for the purpose of enabling him to decide upon the legality of the detention." And in *Gude's Crown Practice*, vol. 1, p. 275, after dealing with the mode of obtaining a writ of habeas corpus in the case of a party in custody under a magistrate's warrant, and the writ of certiorari to bring up the depositions taken upon the commitment, it is said, "If any doubt exists as to the formality of the commitment . . . it may be advisable to have also the affidavit of the party detained and others stating all the circumstances . . . and they will be read when the party is brought up on the return of the writ."

In *Van Boven's Case*, 9 Q.B. 669, a rule for a habeas corpus was obtained, and the record was not brought up by certiorari, but on the return an affidavit was read and used as to the time when the prisoner was arrested and the length of time for which he was remanded, and on that it was claimed that on the day when he was committed he was not lawfully in custody and the magistrate had no jurisdiction to commit him. In *Eggington's Case*, 2 E. & B. 717, the prisoner had been arrested on a Sunday under a warrant following a conviction for wilfully refusing to deliver accounts, books, &c., after his dismissal from the office of town clerk of a borough, and the question was, whether the proceeding, which resulted in his conviction, was virtually a civil action or a criminal proceeding in which he could be arrested on a Sunday. Lord Campbell, C. J., said: The return is good on its face; but he has a full right to bring before us by affidavit the fact that he was arrested on a Sunday." *Re Bailey*, 3 E. & B. 607, was the case of a conviction under the Master and Servant's Act, 4 Geo. 4, c. 34, and the record was not removed by certiorari. On a motion to discharge the prisoner,

he was allowed to use affidavits to show that there was no evidence before the justice from which he could reasonably infer that there was a contract creating the relation of master and servant, as that would show the justice had no jurisdiction.

In view of these authorities, I think the prisoner's affidavit can be read on the present motion. It does not directly contradict the return, but rather, to use the expression of Patteson, J., in *Re Clarke*, 2 Q.B. 619, alleges an extrinsic fact, as it were confessing and avoiding it.

There is then evidence that the preliminary inquiry was wholly proceeded with on Sunday, and to do so was more than an irregularity. The making of such an inquiry was a judicial act, and no judicial act ought to be done on Sunday: *Mackalley's Case*, 9 Co. 66; *Waite v. Hundred of Stoke*, Cro. Jac. 496. In *Burn's Justice*, vol. 1, p. 1212, it is said, "A coroner's inquisition being judicial, must not be conducted on a Sunday." In *Re Cooper*, 5 P.R. 256, two prisoners committed on a coroner's warrant made on a Sunday, the inquisition having been held on that day, were brought up on a habeas corpus before Galt, J., who discharged them, saying that the inquest and inquisition being judicial acts done on Sunday, appeared to him to be void, and there was, therefore, nothing to support the warrant.

Since the Criminal Code was passed, the warrant, although issued on a Sunday, is good under section 564, sub-section 3. But I do not think section 729 has the effect of making a judicial act, such as the taking of a preliminary inquiry on a Sunday, good. That section from its position in the Code, and its language, deals only with matters before a jury, and one can see abundant reasons for such a provision. The corresponding Act in England was passed, it is believed, on account of the difference of opinion between the Court in Ireland in *Reg. v. Conway and Lynch*, 7 Ir. L.R. 149, and the English Court in *Reg. v. Winsor*, 10 Cox C.C. 280.

As the prisoner is entitled to be discharged under the fourth objection, it is unnecessary to consider the others.

An order may issue making the summons absolute, and ordering the prisoner to be discharged without the writ of

habeas corpus actually issuing, or his being personally brought before the Court.

*Order for discharge of prisoner.*

**NOTES :—***Controverting Return.*

A fact directly decided by a court of competent jurisdiction, and stated in the conviction or in a return to a habeas corpus cannot be controverted, but a collateral extrinsic fact, confessing and avoiding the disputed order may be proved on affidavit to show want of jurisdiction. *Re Clarke*, 1842, 2 Q. B. 619, 634, *R. v. Justices of Somersetshire*, 5 B. & C. 816. *Sunday a dies non.*

At common law Sunday is a *dies non juridicus*, and all judicial proceedings on that day are therefore void. 2 Coke's Inst. 264-5, 1 Bishop on Crim. Proc., sec. 207.

Only ministerial acts, and not acts which are judicial could be legally performed in court on a Sunday, and the taking of a verdict is a judicial act, for it might be a verdict which could not be received being bad in law, or it might be a special verdict which required the guidance of the judge in framing it. *R. v. Winsor*, 1866, 10 Cox C.C. 276, 305, 322.

The contrary view prevails in most of the United States, and it is permitted on grounds of public policy to receive and record a verdict on Sunday, or to give additional instructions on Sunday to a jury which had retired on Saturday. *Hodge v. State*, 1892, 10 So. Rep. 556; *Baxter v. People*, 8 Ill. 368; *Jones v. Johnson*, 61 Ind. 257.

It is however now provided as regards offences and proceedings under the Criminal Code by sec. 729 that :—"The taking of the verdict of the jury or other proceedings of the Court shall not be invalid by reason of its happening on Sunday."

The court will take judicial notice that a certain day was Sunday. Wharton on Evidence 3rd Ed., sec. 335; *Tutton v. Darke*, 5 H. & N. 645; *Hanson v. Shackelton*, 4 Dowl. 48; *Pearson v. Shaw*, 7 Ir. L.R. 1.

## [COURT OF QUEEN'S BENCH, QUEBEC.]

CROWN SIDE.

CORAM WURTELE, J.

## THE QUEEN v. ST. LOUIS.

*Costs after recognisance to prosecute—Taxation and scale of—  
Commissioner of Dominion Police—Personal or representative capacity as informant—Liability for costs—  
Cr. Code 595, 835.*

1. The person filling the office of Commissioner of the Dominion Police has, as such, no legal capacity to represent and act on behalf of Her Majesty the Queen, and in laying an information in which he designated himself as such Commissioner of the Dominion Police he acted as a private individual and not as the legal representative of the Crown, although he declared that he was acting as such Commissioner on behalf of Her Majesty the Queen.
2. The accused having been discharged, and the Commissioner having bound himself by recognizance to prefer and prosecute an indictment on the charge contained in his information, and the Grand Jury having thrown out the bill of indictment, the Commissioner was held, under art. 595 of the Criminal Code, to be personally liable for the costs incurred by the accused on the preliminary inquiry and before the Court of Queen's Bench.
3. The costs allowed were not the fees and disbursements paid by the accused to his counsel, such payment being a matter between client and counsel, but such costs as were held by analogy with the costs allowed in civil suits to be costs recoverable from a losing party.
4. Such costs should be taxed according to a tariff made for criminal proceedings, and in the absence of such tariff they are to be taxed in the discretion of the Judge, by implication, according to the spirit of the provisions contained in art. 835 of the Criminal Code.

Montreal, 14 October, 1897.

WURTELE, J.—

On the 22nd October, 1894, an information was laid before Mr. Dugas, one of the judges of the Sessions of the Peace for the City of Montreal, by Arthur Percy Sherwood against Emmanuel St. Louis, charging him with having received different sums of money from Her Majesty the Queen by false pretences. In the information, Mr. Sherwood took the capacity of Commissioner of the Dominion Police, and added to this designation the words "and acting as such on behalf of Her Majesty the Queen."



On this information, the accused was arrested and a preliminary inquiry took place before Mr. Desnoyers, another of the judges of the Sessions of the Peace for the City of Montreal, which lasted from the 2nd November, 1894, to the 13th May, 1895, on which day the magistrate, having found the evidence insufficient, discharged the accused. Thereupon the informant declared that he intended to prefer an indictment before the Grand Jury, founded on the charge which he had made, at the next term of the Court of Queen's Bench, and he required the magistrate to bind him over to prefer and prosecute such indictment, and on the 31st May, 1895, Mr. Sherwood signed a recognizance binding himself to prefer such an indictment against the accused at the session of the criminal court which was to commence on the following day.

In accordance with the provisions of Article 600 of the Criminal Code, the magistrate thereupon transmitted to the clerk of the Crown the information, the depositions, the exhibits produced before him, the statement of the accused, and Mr. Sherwood's recognizance. On the sixth day of the term the Attorney-General of Canada moved, inasmuch as the Attorney-General of Quebec would only allow the Crown Prosecutor to lay the indictment before the Grand Jury if the Federal Government consented to pay the costs of subpoenas and of the attendance of witnesses, that he be permitted to prefer the indictment before the Grand Jury, and the Court gave leave to that effect. Up to this moment the case had been carried on by Mr. Sherwood, without the intervention of the Dominion law officers.

Then a bill of indictment founded on the charge which had been made against the accused by Mr. Sherwood was laid before the Grand Jury; but after examining the witnesses the Grand Jury threw it out, and on the 15th June, 1895, it was returned into Court with the report that the Grand Jury had found "no bill."

On the last day of the June term, the accused, Em. St. Louis, moved that the prosecutor, Arthur Percy Sherwood, should be condemned to pay to him his costs, including the

costs of his appearance on the preliminary inquiry, and after due notice he renewed his application on the 30th March, 1897. The parties were heard on this application at that time, and later on, in the month of June, 1897, a rehearing was ordered, and it took place during the present September term, 1897.

The bill of costs submitted by Mr. St. Louis amounts to \$5,434.73, composed as follows :—

Fees paid to MM. Geoffrion, Dorion & Allan, advocates .....	\$2,500 00
Fees paid to MM. Macmaster & Maclellan, advocates .....	2,200 00
Fees paid to Mr. Emard, advocate .....	200 00
Disbursements to stenographers for copies of the evidence .....	448 08
Disbursements to stenographers, for taking down the addresses made on different occasions by counsel and the judgment rendered by Mr. Desnoyers when he discharged the accused ..	51 65
Amount paid to Mr. Villeneuve for obtaining certain private information .....	35 00

Making the amount claimed of.....\$5,434 73

At the argument it was contended that the information had not been laid by Mr. Sherwood individually, but that he had acted in laying it as an officer of the Government of the Dominion and on its behalf, and that consequently he could not be called upon individually to pay any costs ; and that on the other hand costs are only allowed against the Crown in cases where there is a special provision in the law to that effect. The affidavits of Mr. Sherwood and of Mr. Newcombe, the Deputy Minister of Justice, were produced, stating that the information had been laid, that the recognition to prefer an indictment had been given, and that the bill of indictment had been laid before the Grand Jury on instructions received from the Minister of Justice, and that all Mr. Sherwood's expenses had been paid out of funds of the Government of Canada.

At the time the information was laid, and during the

preliminary inquiry and when the recognizance was given by which Mr. Sherwood bound himself to prefer a bill of indictment, no document had been produced and no intimation had been given to the effect that he was acting in a representative capacity, and it was only on the 6th June, 1895, that the Attorney-General of Canada appeared in the case.

Two questions arise in this matter and have to be considered :—

The first is, whether Mr. Sherwood, in laying the information and entering into the recognizance, acted in a representative capacity or whether he was acting, in so far as the accused and the magistrate were concerned, as an ordinary individual, and therefore whether, under Article 595 of the Criminal Code, he is not liable to pay the costs incurred by the accused, Emmanuel St. Louis, in consequence of the information which had been laid against him?

The second question is, what fees and disbursements should be allowed against him if he should be liable for the payment of such costs?

The Sovereign is supposed by law to be the person who is injured by every infraction of the criminal law, and criminal prosecutions which have for their object the well-being of the people, and not merely private redress, are therefore carried on in the name of the Queen. As the Queen cannot appear in person to demand the punishment of offences against the good order of the community, she has to be represented before the courts by a public officer, and that officer is the attorney-general.

Before the criminal courts the Sovereign is therefore the prosecutor, and is represented either by the attorney-general himself or by crown prosecutors who are named by the attorney-general as his substitutes.

But as offences generally affect some private individual in particular, the person so injured or affected usually commences the proceedings for bringing the offender to justice, although anyone who has reasonable or probable ground for believing that any person has been guilty of a crime may take proceedings and put the law in motion against him.

And, in fact, article 558 of the Criminal Code authorizes anyone who has reasonable or probable grounds to believe that any person has committed an indictable offence, to lay an information in writing and under oath against such person before a magistrate having jurisdiction, and the code then authorizes such magistrate to proceed on such information, and after having held a preliminary inquiry either to commit the accused for trial or to discharge him, according to the evidence adduced. When the accused is committed for trial and the offence is one of a public nature, the prosecution is then carried on by the Government, acting through the attorney-general or his substitutes ; but where the offence is not so much against public order as against the interest of a private individual, the management of the case may be left in his hands as a private prosecutor, although it still remains under the supervision of the law officers of the Crown.

By the Act of Confederation, the administration of justice in each of the Provinces is entrusted to the Provincial Government, and it is therefore the provincial law officers of the Crown whose duty it is to conduct or to supervise, as the case may be, all criminal prosecutions. The proceedings are generally commenced by a private prosecutor, who lays his complaint before a magistrate ; but in cases which concern the Government of the country or affect public interests, the prosecution may be commenced by the provincial attorney-general himself or a crown prosecutor duly authorized by him, directly preferring a bill of indictment before the grand jury, or when the matter regards the federal government by the Attorney-General of Canada doing so, who must, however, be first authorized to do so by the order of a judge or of the court ; or Her Majesty, under the provisions of article 558 of the Criminal Code, may lay an information before a magistrate and thus initiate a prosecution, but, in doing so, the Crown must be represented and must act by the attorney-general of the Dominion or of one of the provinces, as the case may relate either to the Dominion or to a province.

The Attorney-General of Canada is the legal and proper representative of the Crown in all matters which concern the

Government of the Dominion, and he has the superintendence of all matters connected with the administration of justice in Canada not within the express jurisdiction of the Governments of the Provinces. As the conduct or supervision of criminal prosecutions before the criminal courts devolves upon the provincial law officers, the Attorney-General of Canada has no ministerial duties or official legal functions to perform in that connection, and consequently when he, with the consent of a judge or under an order of the court, prefers a bill of indictment, and conducts a prosecution before the petit jury in which the Government of the Dominion is interested, he occupies a position which is analogous to that of a private prosecutor.

In the present case, the proceedings against the accused, Emmanuel St. Louis, were commenced by the laying of an information against him by Mr. Sherwood, who designated himself as the Commissioner of the Dominion Police and stated that he was acting as such on behalf of Her Majesty the Queen.

In the absence of any express provision of law, the attorney-general either of Canada or of one of the Provinces, as the case may require, is alone authorized to represent the Queen, and I have therefore to see if any such authorization has been given to the Commissioner of the Dominion Police. The office is created by ch. 184 of the Revised Statutes of Canada, and his duties and powers are to organize, direct and govern a force of police constables for the purpose of carrying out the laws of Canada; and he is vested with the power and authority conferred upon justices of the peace, police magistrates and stipendiary magistrates in the different provinces. No power or authority is conferred upon the Commissioner of the Dominion Police to represent Her Majesty the Queen or to act on her behalf in criminal proceedings before the Courts, and he, consequently, could and did only act in the present case as a private individual who had reason to believe that a person had committed an indictable offence, and who was desirous of bringing such person to justice; and in fact he terminates

the information in his individual and not in a representative capacity by saying "wherefore I pray for justice," and not by saying "wherefore Her Majesty the Queen, acting by me, prays for justice." He may have been instructed by the Dominion law officers to lay the information as the charge affected the Government of the Dominion. But in so far as the accused and the magistrate were concerned, he was acting as a private individual under the authority of article 558 of the Criminal Code.

Article 595 of the Criminal Code provides that, if the magistrate discharges the accused and the person who preferred the charge desires to prefer an indictment respecting it, he may be bound over to prefer and prosecute such an indictment, and that the magistrate shall then transmit the information and other documents to the clerk of the court having jurisdiction over the matter, but this article also enacts that if the prosecutor so bound over at his own request does not prefer and prosecute such an indictment, or if the Grand Jury does not find a true bill, or if the accused is not convicted upon the indictment so preferred, he shall, if the Court so directs, pay to the accused person his costs in the Criminal Court and also the costs of his appearance on the preliminary inquiry.

The fact that the attorney-general and the Crown prosecutors take charge of a case when it is transmitted to the proper Court and it is a public one, and therefore submit the indictment to the Grand Jury and conduct the case before the Petit Jury, does not relieve the prosecutor from his liability to pay such costs on the happening of any of the events just enumerated.

In the present case, after the accused, Emmanuel St. Louis, had been discharged by the magistrate, Mr. Sherwood undertook to prefer and prosecute an indictment respecting the charge which he had brought against him, and bound himself by recognizance to forfeit to the Crown the sum of \$1,000 in case he should fail to perform his obligation. If he had been acting as the legal representative of the Crown, he certainly could not incur the obligation

to forfeit the sum of \$1,000 to the Crown, as that would have been an obligation by the Crown, acting by its legal representative to pay to itself such sum of money.

There can be therefore no doubt but that in so far as the accused and the magistrate were concerned, Mr. Sherwood acted as a private individual and not in a legal representative capacity when he laid the information and entered into the recognizance to prefer and prosecute an indictment on the charge which he had laid against the accused Emmanuel St. Louis, and that he is therefore liable towards the latter for the costs incurred by him for his defence, up to the time when the attorney-general of Canada intervened in the prosecution, that is up to the 6th June, 1895.

This is my decision on the first question, and I will now proceed to consider the other : what fees and disbursements should be allowed ?

Legal fees are of two kinds, recoverable and irrecoverable. The first are those which can be recovered by law from the losing party, and the latter consist of fees and disbursements which are paid by a client to his counsel in addition to the fees and disbursements which the losing party can be condemned to reimburse to him.

In the present case, the accused Emmanuel St. Louis has a right, under article 595 of the Criminal Code, to recover from the prosecutor his costs up to the date of the intervention of the attorney-general of Canada, including the costs of his appearance on the preliminary inquiry. The question arises, therefore, what are these costs and how should they be taxed ?

As a rule, whenever a party is subject to the payment of costs, such costs must necessarily be determined and assessed by the Court or by a judicial officer to whom that duty is entrusted, and the taxation is made according to the tariff which is contained in a statute or else is made under legal authority. In the case of a summary conviction the costs are regulated by a tariff of fees contained in the Criminal Code, and it is provided, in art. 533, that the majority of the judges of the criminal courts may establish a tariff of costs

for proceedings before such courts. Part 7 of the Criminal Code provides for the payment of costs and expenses incurred in and about certain criminal prosecutions; and art. 835 provides that if no tariff of fees has been made with respect to criminal proceedings, then that the fees to which the party obliged to pay them shall be condemned shall be the fees allowed in civil suits in a superior court of the Province according to the lowest scale. It is true that this article is not specially applicable to the case I have now under consideration, but it gives me a rule to be followed by implication.

It is clear that the costs to be allowed can only be those which come under the head of recoverable costs, and that the party entitled to recover such costs cannot ask to be reimbursed the whole of the retaining fees and refreshers which he may have seen fit to pay to the counsel retained by him.

In the present case, the accused Emmanuel St. Louis saw fit, from the importance of the case, to retain three eminent counsel, and to pay the large fees to them to which, from their position at the bar and from the importance of the case, they were certainly entitled and which were only a fair remuneration for their services; but the accused is not entitled, for that reason, to recover the amount so paid from the prosecutor. All that he is entitled to, is the amount which represents the recoverable costs.

No tariff has been made for cases arising under the provisions of art. 595 of the Criminal Code, and I must therefore apply, by implication, the rule laid down in art. 835. I have examined the tariff of the Superior Court, and I find that it is not applicable to the present case. I have therefore to use my discretion and to allow such fees as appear to me to be reasonable under the circumstances, keeping in view the spirit of the provisions of art. 835. Acting in this manner I allow a fee of \$100 for the preliminary inquiry, and a second fee of the same amount for the proceedings in this court up to the date of the intervention of the attorney-general of Canada, a fee of \$10 for each attendance on the preliminary inquiry and before this court



up to the date above-mentioned, and a fee of \$20 for the fee and the attendance on the motion for costs. I also allow \$446.08 for the amount paid to the stenographers for copies of the evidence which was taken at the preliminary inquiry, and I disallow the other disbursements which were for reporting speeches and for collecting information.

I will now render the formal judgment, which is as follows :—

“Seeing that the accused Emmanuel St. Louis was discharged by the magistrate, after hearing the evidence on the charge made against him by Arthur Percy Sherwood of having obtained money from Her Majesty the Queen by false pretences, and that the above-named Arthur Percy Sherwood, who had preferred the charge, was at his own request bound on the 31st day of May, 1895, to prefer and prosecute an indictment for the charge which he had laid against the accused Emmanuel St. Louis ;

“Seeing that a bill of indictment founded on such charge was laid before the grand jury, but was not found, and that the grand jury on the 15th June, 1895, returned the bill into court, with a finding of ‘ No Bill ’ ;

“Seeing that the accused Emmanuel St. Louis has asked that the prosecutor, Arthur Percy Sherwood, be in consequence thereof condemned to pay the costs incurred by him in this court and on the preliminary inquiry ;

“Seeing articles 595 and 835 of the Criminal Code ;

“It is ordered and directed by the Court that the prosecutor, Arthur Percy Sherwood, do pay to the accused Emmanuel St. Louis his costs on the charge which was preferred against him, incurred as well in this court as on the preliminary inquiry ; and the Court taxes such costs as follows, to wit :

Fee for counsel at preliminary inquiry .....	\$100 00
Forty-six attendances at the inquiry, at \$10.....	460 00
Fee on the case in the Queen's Bench .....	100 00
Four attendances in the Queen's Bench, at \$10...	40 00
Fee and attendance on the motion for costs .....	20 00

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\$720 00

## Disbursements :

E. Raymond.....	\$ 40 00
J. N. Marcil .....	61 63
J. J. Lomax .....	65 00
A. A. Urquhart .....	74 50
Mrs. McGrail.....	17 60
Miss Holdsworth.....	187 35
	<hr/>
	446 08

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\$1,166 08

And condemns the prosecutor, Arthur Percy Sherwood, to pay the same, amounting to \$1,166.08, to the accused, Emmanuel St. Louis."

*C. A. Geoffrion, Q.C., D. Macmaster, Q.C., and S. Beaudin, Q.C.,* counsel for Emmanuel St. Louis.

*John S. Hall, Q.C.,* counsel for A. P. Sherwood, and for the Minister of Justice.

*J. L. Archambault, Q.C., and M. J. F. Quinn, Q.C.,* for the Attorney-General of Quebec.

**Notes :** *Security for costs.*

By the Code, sec. 595 (4), it is provided that :—

The Court before which the indictment is to be tried or a Judge thereof may in its or his discretion order that the prosecutor shall not be permitted to prefer any such indictment until he has given security for such costs to the satisfaction of such Court or Judge.

*Costs—Scale of.*

The words of sec. 595 (3) of the Code differ from the language of sec. 833 by which a defendant in a prosecution for criminal libel is entitled, if successful, to "recover from the prosecutor the costs incurred by him by reason of such indictment or information, either by warrant of distress issued

**Notes : (Continued.)**

out of the said Court, or by action or suit as for an ordinary debt."

The principal case would seem to hold that sec. 835 of the Code applies only to costs awarded under sections 832 to 834 inclusive, the only sections preceding it in part LVII.

That section, first introduced by the Code, is as follows :—

835. Any costs ordered to be paid by a Court pursuant to the *foregoing provisions* shall, in case there is no tariff of fees provided with respect to criminal proceedings, be taxed by the proper officer of the Court according to the lowest scale of fees allowed in such Court in a civil suit.

(2) If such Court has no civil jurisdiction the fees shall be those allowed in civil suits in a superior Court of the province according to the lowest scale.

This section is held in the principal case to be not specially applicable and to be important only as giving a rule to be followed by implication or analogy, but there is room for doubt whether the words "foregoing provisions" are not in themselves wide enough to include all preceding sections of the Criminal Code, instead of being applied to the preceding sections of part LVII. alone.

The word "foregoing" is synonymous with the word "preceding," Century Dict., and the latter word is not confined to the *next* preceding sections, *Attorney-General v. Temple*, 1896, 29 N.S.R. 279.

## [SUPREME COURT OF NEW BRUNSWICK.]

## Ex Parte ROSS.

*Certiorari instead of appeal—Alternative remedy—Discretion  
—Exceptional circumstances.*

1. Where a statute makes provision for an appeal from a summary conviction, the discretion of the Court as to granting a *certiorari* should be exercised by refusing the latter unless special circumstances are shewn therefor.

April 19, 1895.

*Montgomery* moved for a rule *nisi* for *certiorari* to bring up a conviction of the applicant John Ross, made by the Parish Court Commissioner of the Parish of Addington, in the County of Restigouche, for selling liquor on the twenty-fifth day of December, 1894, contrary to the provisions of The Liquor License Act, 1887, 50th Vic. cap. 4, sec. 82, on the following grounds: 1—Variance between adjudication and minute of conviction; 2—Jurisdiction not shewn in the minute of conviction; 3—Costs improperly taxed without evidence as to mileage; 4—Conviction defective because it is headed New Brunswick, to wit; instead of Parish of Addington, to wit.

*Cur. adv. vult.*

On a later day in Term, Mr. Justice Tuck stated that it was the opinion of the Court (Sir John C. Allen, C. J., taking no part) that inasmuch as sec. 117 of The Liquor License Act, 1887, provided a remedy by way of appeal for any one aggrieved by a conviction made against him under the 82nd sec. of the said Act, *certiorari* ought not to go unless in exceptional circumstances. For the Court to decide otherwise would be to nullify the action of the Legislature, and relieve the defendant from giving the bond for costs required by the Act.

*Rule refused.*

**Notes :—*Right of appeal—Effect on certiorari.***

Section 117 of the Liquor License Act (N.B.) 1887, c. 4, enacts as follows :—

In all cases of prosecution for any offence against any of the provisions of this Act, for which any penalty or punishment is prescribed by the 82nd section of this Act, the conviction or order of the justice or magistrate, as the case may be, shall, except as hereinafter mentioned, be final and conclusive, and except as hereinafter mentioned, there shall be no appeal against such conviction or order to any other Court.

(1) An appeal shall lie from a conviction for any offence for which a penalty is prescribed by the 82nd section of this Act to the judge of the County Court of the county in which the conviction is had, without a jury, provided a notice in writing of such appeal is given to the prosecutor or complainant within five days after the date of the said conviction subject to the following provision : (here follow other subsections as to the interim custody of the accused and the giving of a bond with sureties in lieu thereof.)

The decision in the principal case is directly contrary to the rule usually followed. It was held in the leading English case of *R. v. Jukes*, 1800, 8 T. R. 542, 5 Ruling Cases 532 that the right of *certiorari* was not taken away even after an appeal taken by the applicant and decision obtained thereon although the statute authorizing an appeal to the sessions empowered the sessions to "hear and finally determine" the matter. As was stated by Lord Kenyon in that case, a *certiorari*, being a beneficial writ for the subject, could not be taken away without express words.

In matters coming under the provisions of the Criminal Code of Canada, 1892, the right to *certiorari* is taken away in respect of any conviction or order had or made before any justice of the peace if the defendant has appealed therefrom to any court to which an appeal is authorized by law (Cr. Code sec. 887) and also in respect of any conviction or order made upon such appeal, or the conviction or order affirmed, or affirmed and amended, in appeal. (Cr. Code secs. 886, 887.)

And it is well established that a provision taking away the

**Notes : (Continued.)**

*certiorari* does not apply where there was an absence of jurisdiction. Ex parte *Bradlaugh*, 1878, 3 Q.B.D. 511; but although the writ is allowed to issue, the order removed will not be quashed in such a case except upon the ground either of a manifest defect of jurisdiction or a manifest fraud in procuring it. *Colonial Bank v. Willan*, 1874, L.R. 5 P.C. 417.

The power of a Superior Court to remove proceedings before justices of the peace is incident to the superintending authority which that Court possesses over inferior jurisdictions and it was held that the direction of a statute (22 Car. 2, c. 1, s. 6) which gave an appeal to the sessions and enacted that "no other Court whatsoever shall intermeddle with any cause or causes of appeal upon this Act but they shall be *finally determined* in the quarter sessions *only*" did not prevent the removal of the order by *certiorari*. *R. v. Morley* 2 Burrows 1040. Unless the intention to do away with the writ is shewn by express mention of *certiorari*, it will be inferred that the "determination" referred to is in reference to matters of fact only. *R. v. Plowright* 3 Mod. 95, 2 Hawkins Pleas of the Crown 6th Ed. c. 27, s. 23.

## [SUPREME COURT OF NEW BRUNSWICK.]

**Ex Parte EMMERSON.**

(33 N. B. R. 425.)

*Certiorari—Copy of Proceedings below—Practice.*

1. On a motion for a *certiorari* it is necessary to produce a copy of the proceedings sought to be removed.
2. A rule *nisi* for *certiorari* was quashed in default of such copy in support thereof.

November 7, 1895.

*Jordan*, Q. C., moved to discharge a rule *nisi* for *certiorari*.  
*Slipp*, contra.

The Court (Sir John C. Allen, C. J., taking no part) discharged the rule, because a copy of the original proceedings was not attached to or exhibited with the affidavits upon which the rule was granted, nor did the latter disclose what the proceedings were, and it was not shewn that a copy could not have been obtained.

**Notes : *Certiorari—Material in support.***

An application by a defendant for a *certiorari* to remove a conviction must be supported by an affidavit shewing the grounds on which it is sought. *R. v. Clace*, 4 Burr. 2458 ; *R. v. Stannard*, 4 T. R. 161 ; *R. v. Burgess*, 1 Ken. Rep. 531.

The affidavit should be entitled in the Court to which application is made and not in the Court below. *Ex p. Nohro*, 1 B. & C. 267 ; 1 Burns' Justice 634.

Where the application was for the removal of an inquisition to assess compensatory damages for lands expropriated under a railway Act, it was held that an exact copy of the inquisition should be verified by affidavit or the omission to produce same should be accounted for. *R. v. Manchester and Leeds Ry.*, 1838, 8 A. & E. 413. If a copy cannot be procured that fact should be positively sworn to, *Ibid.* The latter rule of practice is now embodied in the English Crown Office Rules (No. 35). Short & Mellor's Prac., 154, 521.

A party after once failing in consequence of a defect in the way in which he brought his case forward, is not entitled to renew the same application, *R. v. Manchester and Leeds Ry.*, 1838, 8 A. & E. 413, 427.

## [COURT OF QUEEN'S BENCH, QUEBEC.]

CROWN SIDE.

BEFORE WURTELE, J.

## THE QUEEN V. CIARLO.

*Witness—Former deposition—Admissibility to contradict testimony—Irregularity in—Duty of Coroner—Trans-  
lation of evidence as given—Effect of.*

1. Notes of evidence taken by the coroner at an inquest which do not contain the precise expressions of the witness, but a summary only of the evidence, are not admissible in contradiction of the witness' testimony in a subsequent proceeding unless signed by the witness, or unless read over to and acquiesced in by him.
2. The witness may in such case be cross-examined as to any material statements made by him at the inquest, and witnesses may be called to show that he then made a different and contradictory statement.
3. Depositions of a witness speaking in French taken down by the translator in English at a preliminary inquiry but not read over and explained to the witness or signed by him are not admissible to contradict his testimony on a subsequent proceeding, but the witness may be cross-examined as to material statements then made, and witnesses called to show a contradiction with his former testimony.

MONTREAL, March 9, 1897.

A witness of the name of Frederic Linteau was under examination, and Mr. St. Pierre, Q.C., of counsel for the prisoner, moved that the deposition given by him at the coroner's inquest on the 12th January, 1897, be read for the purpose of showing a contradiction with the evidence which he was then giving.

The deposition was placed in the hands of the judge, and it appeared that it did not contain the witness' own expressions, but that it contained merely notes taken by the coroner of his evidence, that it was not signed by the witness and did not appear to have been read over to him.

WURTELE, J. :—

A witness may be cross-examined as to previous statements made by him in a deposition taken at the preliminary inquiry, and such deposition may be read for the purpose of



establishing a contradiction in the evidence being given by him at the trial with that given by him at the preliminary inquiry ; but in such case it should be established that the evidence at such preliminary inquiry has been properly taken down and that the deposition had been read over to him and signed by him, except where the evidence has been taken in shorthand, when it is sufficient that the evidence be authenticated by the affidavit of the stenographer.

In like manner a deposition taken at a coroner's inquest may be used for the purpose of contradiction, but in such case it is necessary that the same formalities should have been observed as when the evidence is taken at a preliminary inquiry before a justice of the peace.

The manner in which depositions should be taken at a coroner's inquest is laid down by Sir John Jervis in his work on the office and duties of Coroners, at page 219 as follows :

"It is the duty of the coroner, upon any inquisition whereby any person is charged with murder or manslaughter, to put in writing during the sitting of the court the evidence given to the jury before him, or so much of it as may be material. He should, where possible, follow the precise expressions of the witnesses in the first person ; after each witness is examined the coroner should read over to him his information and require him to sign it for the purpose of identification, and the deposition must also be signed by the coroner."

In the present case, the coroner did not take down the words or expressions of the witness, and neither the witness nor the coroner has signed the document which is called a deposition. It is in fact not the witness' deposition, but a statement of the coroner's opinion of what he said.

The witness can be contradicted by his own statement, but not by the recital merely of another person of what he thinks the witness may have said. But the witness may be cross-examined as to any material statements he may have made before the coroner at the inquest, and then witnesses may be examined for the purpose of showing a contradiction.

I rule, therefore, that the deposition produced cannot be read for the purpose of contradicting the witness.

The order of the court was recorded as follows :

“ Ordered that the deposition be not read, inasmuch as only notes of the witness' evidence were taken down which do not appear to have been read over to him and were not signed by him, and his words and meaning may not have been correctly and exactly stated ; but that the witness may be cross-examined about any material statement he may have made before the coroner, at the inquest, to allow the defence to examine witnesses with the object of showing a contradiction.”

While the same witness was under examination, Mr. St. Pierre, Q.C., the prisoner's counsel, also moved that the deposition given by the witness on the 3rd February last, at an inquiry held by C. A. Dugas, Esq., one of the judges of the Sessions of the Peace, be read, for the purpose of showing a contradiction with the evidence then being given.

It appeared that the witness, who only speaks French, gave his evidence in that language, but that it was taken down in English by a translator, and that the deposition had not been read over and explained to him, and had not been signed by him.

WURTELE, J. :—

In order to show a contradiction between the evidence given by a witness at a preliminary inquiry and that being given by him at the trial, his deposition may be read, but such deposition should contain the witness' own words and expressions. In the present case, the evidence was given in French, but it was translated and taken down by the translator in English. The words taken down are the translator's, and what was so taken down was not explained to the witness. The meaning of the words uttered by the witness may have been entirely altered in the translation, and the witness must be contradicted by what he may have previously said himself, and not by what a translator, without verification, has made him say. The deposition, therefore, should not be used for that purpose.

I consequently rule that the deposition cannot be read.

But the witness may be cross-examined as to any statement made by him relative to the subject-matter of the case at the preliminary inquiry and inconsistent with the evidence he has now given, and should he not admit such statement, it may then be proved by witnesses who were present and heard it.

The formal order of the Court is as follows :—

“ Ordered that the deposition be not read, inasmuch as the evidence of the witness was given in French, but was translated and taken down in English, and does not contain the witness' own words, and the meaning of the witness may therefore not have been correctly and exactly stated, but that the witness may be cross-examined about any material statement alleged to have been made before Mr. Dugas, to allow the defence to examine witnesses with the object of showing a contradiction.”

*J. L. Archambault, Q.C., and M. J. F. Quinn, Q.C., for the Crown.*

*H. C. Saint Pierre, Q.C., for the prisoner*

**Notes :—***Depositions before magistrate.*

The manner of taking depositions at a preliminary inquiry before a justice of the peace is regulated by Cr. Code secs. 590, 591 and 593.

The evidence must be in the presence of the accused 590 (2); with an opportunity to cross-examine, 590 (2); and shall be taken down in writing, and shall be read over to and signed by the witness and the magistrate, in the presence together of the accused, the witness and the magistrate, 590 (4); unless taken “in shorthand” by a sworn stenographer whose transcript of the evidence must be signed by the magistrate, and be accompanied by the stenographer's affidavit that it is a *true report* of the evidence, 590 (7).

Magistrates are required by law to put down the evidence of witnesses, or so much thereof as shall be material. *R. v. Thomas*, 1836, 7 C. & P. 718.

The object of a statutory provision giving prisoners the right to a copy of the depositions is to enable them to know

**Notes : (Continued).**

what they have to answer on their trial, and the magistrate should therefore take down all that took place before him with respect to the charge. *R. v. Grady*, 1836, 7 C. & P. 650.

A witness' deposition purporting to have been taken before a justice on the investigation of the charge, and to be signed by the witness and the justice, returned to and produced from the custody of the proper officer, is presumed *prima facie* to have been signed by witness. Cr. Code 700.

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[SUPREME COURT OF NEW BRUNSWICK.]

**THE QUEEN V. COREY.**

(CROWN CASE RESERVED.)

*Counterfeit tokens—Offence of selling—"Counterfeit" defined*  
—Cr. Code 479.

1. A paper which is a spurious imitation of a government treasury note is a counterfeit, or what purports to be a counterfeit token of value under Cr. Code, sec. 479, although there is no original of its description.

The defendant George G. Corey, was tried before the Saint John County Court, July Term, 1894, and convicted for selling, with intent to defraud the public and one Henry F. Allbright, certain counterfeit tokens of value or what purported to be certain counterfeit tokens of value, resembling and intending to resemble United States Government notes, or Treasury notes of the United States of America.

January 30, 1895. *L. A. Currey*, Q. C., moved to quash the conviction. The defendant was tried under an indictment containing nine counts; he was acquitted on all except the ninth, which charged him with selling counterfeit, or what purported to be counterfeit tokens of value. The notes in this case are not counterfeits, nor do they purport to be counterfeits. A counterfeit must have an

original, and there is no evidence that originals for these or anything like them, ever existed. If there were no original, clearly they could not be counterfeits; and for a like reason they could not purport to be counterfeits. Reads: Sec. 419, 434, 479, 480 (sub b.), The Criminal Code, 1892. The learned Judge, on the trial, directed the jury that they were counterfeit tokens of value. This was a matter of law, and he should have directed them that they were not counterfeit tokens of value. They are not promissory notes, bills of exchange, drafts, checks, or promises to pay. They are nothing. A thing purports to be only what it is on its face. *Reg. v. Attwood*, 20 Ont. Rep. 574; *Rex v. Reading*, 1 East. 108 note b; *Reg. v. Hermann*, 4 Q. B. D. 284; *U. S. v. Wilson*, 44 Fed. Rep. 751; *Rex v. Jones*, 1 Leach C. C. 204; *Commonwealth v. Morse*, 2 Mass. 138; *Commonwealth v. Bond*, 1 Gray (Mass.) 564; *State v. McKensie*, 42 Me. 392; *Regina v. Tierney*, 29 Q. B. Ont. 181.

*Blair, A. G.*, contra. The offence is founded largely under sec. 480 (sub b.) of The Criminal Code. The notes are made to deceive the unwary; and, whatever they may be, they purport to be counterfeit United States Treasury notes.

*Currey*, in reply.

*Cur. adv. vult.*

April 23, 1895.

The judgment of the Court, SIR JOHN C. ALLEN, C. J., and LANDRY, J., taking no part, was delivered by

TUCK, J.

This is a crown case reserved. The defendant was convicted at the County Court, Saint John, upon an indictment containing nine counts. He was found guilty under the ninth count of the indictment, which reads as follows: "And the jurors aforesaid upon their oath aforesaid, do further present; that the said George G. Corey, on the day and year aforesaid, at the City of Saint John, aforesaid, in the City and County aforesaid, having in his possession certain counterfeit tokens of value, or what

purported to be certain counterfeit tokens of value, resembling and intended to resemble United States Government notes, or treasury notes of the United States, being undertakings for the payment of money, made and used by the United States of America, and so having such counterfeit tokens of value, or what purported to be counterfeit tokens of value in his possession, did, on the day and year last aforesaid, in the City of Saint John aforesaid, in the City and County aforesaid, with intent to defraud the public, or some person or persons and one Henry F. Allbright, use the same by selling and delivering a large quantity thereof, purporting to be of the value of eight hundred dollars in the whole, and being of various denominations or values, namely, in sums of five, ten, and twenty dollars, respectively, to the said Henry F. Allbright, in consideration of the sum of one hundred dollars, to him, the said George G. Corey paid by the said Henry F. Allbright, upon receiving delivery of the said counterfeit tokens of value, contrary to the form of the statute in such case made and provided." Specimens of these counterfeit tokens of value are set out in the eighth count of the indictment, and are as follows :

"A United States 5"

"Pay the bearer on the demand,

"Charleston, June, 1862,

"Five Dollars.

"JAMES SMITH,

W. R. HOYED.

"President,

Cashier."

This paper had on the left hand upper corner a vignette cut of Washington, on the right hand upper corner a figure five, and on the right hand lower corner an Indian seated, and on the left hand lower corner a husbandman leaning on a scythe, and on the back the following words were printed :

A. "Receivable in payment,  
S. United States of America,  
D. of all dues."

U.  
S.  
A.

The ten dollar documents and the twenty dollar documents purport to represent a value of ten and twenty dollars respectively, and have the same cuts and vignettes on the three corners, as upon those for five dollars, but different as to numbers and series. On the tens, the words "Treasury" and "we have pledged," are printed on the right hand corner, and on the back of the twenties are printed the words :

TWENTY DOLLARS.

"The United States,  
Status vuvanti bellum  
of America, U. S. A.

TWENTY DOLLARS.

By The Criminal Code, section 434, it is enacted that any one is guilty of an indictable offence and liable to fourteen years' imprisonment, who, without lawful authority or excuse (the proof whereof shall lie on him (Sub. sec. f.) "Engraves or marks upon any plate or material, anything intended to resemble the whole or any distinguishing part of any bond or undertaking for the payment of money, used by any dominion, colony or possession of Her Majesty, or by any foreign prince or state, or by any body corporate, or other body of the like nature, whether within Her Majesty's dominions or without ;" or, (Sub. sec. h.) "knowingly offers, disposes of, or has in his possession any paper upon which such bond or undertaking or any part thereof has been printed."

In The Criminal Code, under the head, "Advertising counterfeit money," it is by Sec. 479 enacted, that "in this part the expression, 'counterfeit tokens of value,' means any spurious or counterfeit coin, paper money, inland revenue stamp, postage stamp, or other evidence of value, by whatever technical, trivial or deceptive designation, the same may be described."

Sec. 480. "Every one is guilty of an indictable offence, and liable to five years' imprisonment, who prints, writes,

utters, publishes, sells, lends, gives away, circulates or distributes, any letter, writing, circular, paper, pamphlet, handbill, or any written or printed matter, advertising or offering, or purporting to advertise or offer for sale, loan, exchange, gift or distribution, or to furnish, procure or distribute, any counterfeit token of value, or what purports to be a counterfeit token of value, or giving or purporting to give, either directly or indirectly, information where, how, of whom, or by what means any counterfeit token of value, or what purports to be a counterfeit token of value may be procured or had."

I presume that the ninth count was framed under the provisions of the foregoing sections.

In charging the jury upon the ninth count, the learned Judge of the County Court, said: "I direct you that the documents proved in this case under the designation, 'counterfeit tokens of value,' are sufficient so far as the ninth count is concerned." I think the learned Judge was right.

For the defendant, it is urged that the conviction should be quashed, because the documents or paper writings put in evidence are not tokens of value, or counterfeit tokens of value; that they do not purport to be, nor is there any evidence that they are of that character. But if there is any question as to this, that should have been left to the jury.

In my opinion these paper writings come right within the meaning of the expression, "counterfeit tokens of value," as defined in sec. 479. On their face they profess to be evidence of value, when in fact they are worthless. The whole document, the manner in which it is printed; the words, "United States"; "pay the bearer"; "five dollars"; "James Smith, Pres."; "W. R. Hoyied, Cashier"; "receivable in payment — United States of America of all dues", shew that they are and are meant to pass from hand to hand as evidence of value, and are calculated to deceive and cheat the unthinking and unwary. Then they are false or spurious. They are not



what they profess to be. These papers are in size and general appearance like bank notes or United States Treasury notes.

A banker like Mr. Phillips, or Mr. Stone or Mr. Clinch, would not be deceived by such documents, but it is easy to conceive that many persons in the outlying portions of this Province might be cheated by the circulation of similar papers. It seems to me that the sections are passed to meet just such a crime as the one here charged. The stuff bears on its face the evidence of value, while in fact it is spurious. The section says "any counterfeit token of value, or what purports to be a counterfeit token of value." The words "purports to be" in the Statute, must have a meaning different from the positive words "any counterfeit token of value". Now these documents purport to be counterfeits of genuine United States Government or Treasury notes, when in truth there are no originals of such a character or description. But this man Corey wished to make some person or persons believe that these were real counterfeits of genuine notes. No one who goes to purchase this kind of stuff thinks for a moment that he is receiving honest bank or treasury notes, for he is getting eight or ten dollars for every one he pays. He knows that he is buying a spurious article. But he has a right to believe, dishonest though he is, that he is getting a counterfeit of good money, and not a piece of paper, which is a counterfeit of nothing. Corey professed to sell All-bright counterfeits of United States Government or Treasury notes, when in reality they were nothing of the kind. In selling such paper the defendant was guilty of an offence against the Statute.

In Taschereau's Criminal Code, at p. 556, the author says, "On indictment for offering to purchase counterfeit tokens of value a prisoner cannot be convicted on evidence that notes which he offered to purchase were not counterfeit, but genuine bank notes unsigned, though he offered to purchase in the belief that they were counterfeit," and cites *Queen v. Attwood*, 20 Ont. R. 574. I find upon refer-

ring to the report, that the judgment is by a majority of the Court, Rose and MacMahon, JJ. I prefer the judgment of Galt, C. J., who says, "In all criminal offences it is the evil intent that constitutes the crime, and that such rule was intended by the Legislature to apply to the present case is apparent from the using of the words counterfeit tokens of value or what purports so to be. If the instrument was counterfeited there could be no purporting, because it was so; and therefore if a person to whom tokens of value were offered as counterfeit, and he, believing them to be so, offered to purchase them, he comes within the clause, for so far as he was concerned, although they were genuine, they, through the representation made to him, purported to be counterfeit."

In my opinion the Judge was right in putting a construction upon these papers, which were in evidence, and it was not for the jury to find whether or not they were counterfeit tokens of value, or purported so to be.

The conviction must be affirmed.

*Conviction affirmed.*

**Notes :—**"*Purporting*" to be counterfeit money.

Under an agreement that a purchaser shall not be put upon inquiry upon any sale *purporting* to be made in pursuance of a power, the parties must be held to have contemplated that what purported to be a sale in pursuance of the power might not be any sale at all, that is, that the power would not be really exercisable. Per Jessel, M. R., *Dicker v. Angerstein*, 1876, 3 C. D., 600, 602.

In *Jones' case*, 1779, 1 Doug. 300, a prisoner was indicted for having in his custody a certain forged and counterfeited paper-writing *purporting* to be a bank note, and a special verdict was returned therein that the paper-writing was forged, and that the prisoner well knowing it not to be a bank note averred it to be a good bank note, and disposed of it as such with intent to defraud.

It appeared that the document was made in the form and appearance of a bank note, but was not signed. Lord Mansfield in directing the prisoner's discharge said :—

**Notes : (Continued).**

"The representations of the prisoner after the note was made could not alter the purport, which is what appears on the face of the instrument itself. Such representations might make the party guilty of a fraud or cheat."

Section 480 of the Code covers not only the case of counterfeit money, *i. e.*, false tokens purporting to be bank notes, etc., but false tokens purporting to be *counterfeit* tokens.

The language of section 474 as to uttering counterfeit gold or silver coins is : "Every one is guilty of an indictable offence, and liable to fourteen years' imprisonment who utters any counterfeit coin, resembling or apparently intended to resemble or pass for any current gold or silver coin, knowing the same to be counterfeit."

The word "apparent" in the latter section would seem to confine the proof of intended resemblance to the counterfeit coin itself, and if the so-called coin was not in itself apparently intended to resemble or pass for a current coin it would not aid the prosecution to shew that the prisoner had represented that, although not a genuine coin, it could be easily passed as such.

The words "what purports to be" in sec. 480 (formerly 51 Vict. (Can.) c. 40) import what appears on the face of the instrument, and therefore what was said to the prisoner, or what he thought or believed, would not be of any moment. Per Rose, J., *R. v. Attwood*, 1891, 20 Ont. R. 574, 578.

When a person exhibits to another bank notes representing them as counterfeit, when in fact they are not so, the offer to purchase such notes cannot be an offence under the Act, as the prisoner was offering to purchase that which the party had to sell, which were not counterfeit tokens of value. Per MacMahon, J., *R. v. Attwood*, 1891, 20 Ont. R. 574, 581.

In the last named case, the defendant was prosecuted for offering to purchase bank notes which were shewn to him as counterfeit, but were in fact genuine bank notes unsigned.

*Counterfeits not in esse.*

Doubt was also expressed in the *Attwood* case as to

**Notes : (Continued).**

whether the section applies to counterfeit tokens not *in esse*, MacMahon, J., saying that it may be that the clause of the statute would require to be amended in order to reach a person offering to purchase such.

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[COURT OF QUEEN'S BENCH, QUEBEC.]

CROWN SIDE.

BEFORE WURTELE, J.

**THE QUEEN v. H. B. CAMERON.**

*Habeas Corpus Act (Que.)—Bail as constructive imprisonment—Felony or misdemeanor prior to Criminal Code—Effect of Cr. Code, 535.*

1. A provincial statute prior to Confederation, providing for the discharge from imprisonment in default of indictment of an accused person committed for a "felony" will apply equally to cases which were misdemeanors before the abolition by the Criminal Code of Canada of the distinction between felony and misdemeanor.
2. A person admitted to bail is in custody and is constructively in gaol, so as to entitle him to the benefit of such a statute.

MONTREAL, April 20, 1897.

WURTELE, J. —

On the 16th of October last, the defendant was committed by Judge Desnoyers for trial on an accusation of having written and published a defamatory libel concerning one Wm. L. Hogg. The defendant is a physician who resides in the Province of British Columbia, and he was arrested in that province in the month of September last, and brought into this province to answer the information which had been laid against him. When he was committed for trial, Judge Desnoyers admitted him to bail, to appear at the November term of the Court of Queen's Bench, for the purpose of taking his trial, and in the meantime not to depart the Court without leave.

In November, he appeared according to the tenor of his recognizance, and remained in attendance during the term and asked to be brought to trial, but no bill of indictment

was preferred against him. He appeared again during the present term and asked to be brought to trial, but once more no bill of indictment was preferred against him. He now moves that his bondsmen be released, and that the recognizance entered into by them and himself be discharged and vacated.

He alleges that it is an injustice to keep him here, away from his home in British Columbia, on bail, inasmuch as no diligence has been made either by the Crown or the private prosecutor to proceed against him on the information laid against him for having committed the alleged defamatory libel against Wm. L. Hogg.

By the act respecting the writ of *habeas corpus*, bail and other provisions for securing the liberty of the subject, (C.S.L.C., ch. 95,) it is provided that when a person has been committed for a felony and, having prayed to be brought to trial, is not indicted during the next term of the Court of Queen's Bench after such commitment, the Court shall, upon motion made in open court, set the prisoner at liberty upon bail, unless it be shown that the witnesses could not be procured for that term, and, after having asked to be brought to trial, if he be not indicted and tried at the second term after his commitment, that he be discharged from his imprisonment. The Act respecting the writ of *habeas corpus*, bail and other provisions for securing the liberty of the subject is one which relates to the criminal law and to procedure in criminal matters, and it therefore falls under the legislative authority of the Parliament of Canada. As the distinction between felony and misdemeanor has been abolished by the Criminal Code, it follows that this Act must apply in all cases whether they were felonies or misdemeanors prior to the enactment of the Criminal Code. Were he in gaol under the circumstances alleged in his motion, he would be discharged from his imprisonment.

But bail is custody and he is constructively in gaol ; and he has the same right to be released from this custody as he would have to be released from an imprisonment.

I therefore grant the motion, and order that his sureties

be discharged, and I declare the recognizance entered into by them and him to be discharged and vacated.

Defendant discharged from custody under bail.

*Smith & Markey*, for the defendant.

*J. L. Archambault*, Q.C., for the Crown.

*Greenshields, Greenshields, Laflamme & Glass*, for the private prosecutor.

**Note :—**

Sec. 535 of the Criminal Code, 1892, is as follows :—

After the commencement of this Act. the distinction between felony and misdemeanor shall be abolished, and proceedings in respect of all indictable offences (except so far as they are herein varied) shall be conducted in the same manner.

Were it not for the latter portion of the section there would be room for contention that an Act passed before the abolition of the distinction would continue to apply only to such offences under the Code as were formerly within such Act. The direction in the Code that proceedings in respect of all indictable offences, etc., shall be conducted in the same manner, may be viewed as an amendment, widening by necessary implication the scope of the former Act.

## [SUPREME COURT OF CANADA.]

BEFORE SIR HENRY STRONG, C.J., AND GWYNNE, SEDGEWICK, KING AND GIROUARD, JJ.

**In the Matter of Sections 275 and 276 of the Criminal Code, 1892, RELATING TO BIGAMY.**

SPECIAL CASE REFERRED BY THE GOVERNOR-GENERAL  
IN COUNCIL.

*Bigamy—Married person leaving Canada with intent to go through a form of marriage elsewhere—Extra territorial offence—Jurisdiction—British or Canadian Parliament—Cr. Code 275, 276.*

1. The Parliament of Canada has jurisdiction to constitute the leaving Canada by a British subject resident therein with an intent to perform elsewhere a prohibited act an indictable offence, upon the act itself being performed.
2. A British subject domiciled in Canada, and only temporarily absent, continues to owe to Her Majesty in relation to her government of Canada an obligation to refrain from the completion, whilst absent without any *animus manendi*, of a prohibited act, a material part of which is committed by him in Canada.

ARGUED : March 17, 1897.

DECIDED : May 1, 1897.

Special case referred by the Governor-General in Council to the Supreme Court of Canada for hearing and consideration :—

His Excellency, in virtue of the provisions of the Supreme and Exchequer Courts Act, as amended by the Act 54 & 55 Victoria, Chapter 25, intituled "An Act respecting the Supreme and Exchequer Courts," and by and with the advice of the Queen's Privy Council for Canada, is pleased to refer, and does hereby refer, the following questions touching the constitutionality of legislation of the Parliament of Canada, to the Supreme Court of Canada for hearing and consideration, namely :—

1. Had the Parliament of Canada authority to enact sections 275 and 276 of the Criminal Code, 1892 ?

2. If the said sections or either of them are *ultra vires* in part only, then (a) what portions of the said sections are *ultra vires*; (b) to what extent are the said sections, or either of them, *ultra vires*?

Sections 275 and 276 of the Criminal Code, 1892, are as follows :—

“ 275. Bigamy is—

“(a.) The act of a person who, being married, goes through a form of marriage with any other person in any part of the world; or

“(b.) The act of a person who goes through a form of marriage in any part of the world with any person whom he or she knows to be married; or

“(c.) The act of a person who goes through a form of marriage with more than one person simultaneously or on the same day. R.S.C., c. 37, s. 10.

“ 2. A ‘form of marriage’ is any form either recognized as a valid form by the law of the place where it is gone through, or, though not so recognized, is such that a marriage celebrated there in that form is recognized as binding by the law of the place where the offender is tried. Every form shall, for the purpose of this section, be valid, notwithstanding any act or default of the person charged with bigamy, if it is otherwise a valid form. The fact that the parties would, if unmarried, have been incompetent to contract marriage shall be no defence upon a prosecution for bigamy.

“ 3. No one commits bigamy by going through a form of marriage—

“(a.) If he or she in good faith, and on reasonable grounds, believes his wife or her husband to be dead; or

“(b.) If his wife or her husband has been continually absent for seven years then last past, and he or she is not proved to have known that his wife or her husband was alive at any time during those seven years; or

“(c.) If he or she has been divorced from the bond of the first marriage; or



"(d.) If the former marriage has been declared void by a court of competent jurisdiction. R.S.C., c. 161, s. 4.

"4. No person shall be liable to be convicted of bigamy in respect of having gone through a form of marriage in a place not in Canada, unless such a person, being a British subject resident in Canada, leaves Canada with intent to go through such form of marriage.

"276. Everyone who commits bigamy is guilty of an indictable offence and liable to seven years' imprisonment.

"2. Everyone who commits this offence after a previous conviction for a like offence shall be liable to fourteen years' imprisonment. R.S.C., c. 161, s. 4."

These enactments had been held *intra vires* by the Chancery Division of the High Court of Justice for Ontario, in *Reg. v. Brierly*, 14 O.R. 525, Chancellor Boyd, Ferguson and Robertson, JJ., constituting the court. In that case the bigamous marriage had been contracted outside of Canada, but the facts were within the saving clause of sub-section 4 of section 275. Afterwards, in the case of *Reg. v. Plowman*, 25 O.R. 656, the question was raised in the Queen's Bench Division of the High Court of Justice of Ontario as to the validity of a conviction for bigamy where the facts were substantially the same as in *Reg. v. Brierly*, 14 O.R. 525. The court—consisting of Armour, C.J., and Falconbridge, J.—held the above sections *ultra vires* in so far as they constituted the acts of the defendant, as stated, an offence, and that the case was covered by the authority of *Macleod v. Attorney-General for New South Wales*, [1891] A.C. 455.

*Newcombe*, Q.C., Deputy Minister of Justice, for the Government of Canada. Similar legislation by the Parliament of the United Kingdom would be valid; *In re Tivnan*, 5 B. & S. 679; *The Queen v. Keyn*, 2 Ex. D. 152; and the Parliament of Canada has like authority by sec. 91 of the British North America Act. *Hodge v. The Queen*, 9 App. Cas. 117; *Riel v. The Queen*, 10 App. Cas. 675; *Valin v. Langlois*, 3 Can. S.C.R. 1.

*Macleod v. Attorney-General for New South Wales*, [1891] A.C. 445, is distinguishable. In that case the prisoner had

no domicile in New South Wales when the offence was committed. And see *Fielding v. Thomas*, [1896] A.C. 600.

No counsel appeared to oppose the validity of the said sections.

Ottawa, May 1, 1897.

THE CHIEF JUSTICE (dissenting).

This reference comes before the court under an Order in Council bearing date the 25th day of April, 1896, and which is in the terms following :

His Excellency, in virtue of the provisions of the Supreme and Exchequer Courts Act, as amended by the Act 54 & 55 Victoria, Chapter 25, intituled "An Act respecting the Supreme and Exchequer Courts," and by and with the advice of the Queen's Privy Council for Canada, is pleased to refer, and does hereby refer, the following questions touching the constitutionality of legislation of the Parliament of Canada, to the Supreme Court of Canada for hearing and consideration, namely :—

1. Had the Parliament of Canada authority to enact sections 275 and 276 of the Criminal Code, 1892 ?

2. If the said sections or either of them are *ultra vires* in part only, then (a) what portions of the said sections are *ultra vires*; (b) to what extent are the said sections, or either of them, *ultra vires*?

Sections 275 and 276 of the Criminal Code, 1892, are as follows :—

275. Bigamy is—

(a) The act of a person who, being married, goes through a form of marriage with any other person in any part of the world ; or

(b) The act of a person who goes through a form of marriage in any part of the world with any person whom he or she knows to be married ; or

(c) The act of a person who goes through a form of marriage with more than one person simultaneously or on the same day. R.S.C., c. 37, s. 10.

2. A "form of marriage" is any form either recognized as a valid form by the law of the place where it is gone through, or, though not so recognized, is such that a marriage celebrated there in that form is recognized as binding by the law of the place where the offender is tried. Every form shall, for the purpose of this section, be valid, notwithstanding any act or default of the person charged with bigamy, if it is otherwise a valid form. The fact that the parties would, if unmarried, have been incompetent to contract marriage shall be no defence upon a prosecution for bigamy.

3. No one commits bigamy by going through a form of marriage—

(a.) If he or she in good faith, and on reasonable grounds, believes his wife or her husband to be dead ; or

(b.) If his wife or her husband has been continually absent for seven years then last past, and he or she is not proved to have known that his wife or her husband was alive at any time during those seven years ; or

(c.) If he or she has been divorced from the bond of the first marriage ; or

(d.) If the former marriage has been declared void by a court of competent jurisdiction. R.S.C., c. 161, s. 4.

4. No person shall be liable to be convicted of bigamy in respect of having gone through a form of marriage in a place not in Canada, unless such a person, being a British subject resident in Canada, leaves Canada with intent to go through such form of marriage.

276. Everyone who commits bigamy is guilty of an indictable offence and liable to seven years' imprisonment.

2. Everyone who commits this offence after a previous conviction for a like offence shall be liable to fourteen years' imprisonment. R.S.C., c. 161, s. 4.

I am of opinion that paragraphs (a) and (b) of sub-section one of section 275, so far as they apply to persons who, being already married, may go through a form of marriage with any other person, and to persons who may go through a form of marriage with a person whom he or she knows to be

married, elsewhere than in Canada, are *prima facie ultra vires* of the Parliament of the Dominion. And, I am further of opinion that the limitation imposed by sub-section 4 of section 275, that in order that a person may be convicted of bigamy in respect of having gone through a form of marriage, in a place not in Canada, such person must be a British subject, resident in Canada, and must have left Canada with intent to go through such form of marriage, has not the effect of so qualifying paragraphs (a) and (b) of sub-section 1, as to bring the substantive enactment contained in (a) and (b) within the powers of Parliament.

The legal construction of these provisions is clear. The offence is made to consist in a marriage anywhere without the Dominion of Canada, and although the condition is imposed that the party must have left Canada with the intent of celebrating such a pretended marriage, yet the so leaving Canada is not the offence constituted by the Code, but the criminal act is the marriage without the territorial jurisdiction of Parliament. I cannot read the provisions in question as equivalent to a declaration that it shall be a criminal offence to leave Canada with intent to go through the form of a bigamous marriage contract with the condition superadded that such a marriage shall afterwards be celebrated, thus making the essence of the offence to consist in leaving the Dominion with the criminal intent, for such leaving the Dominion is not by itself declared to be any criminal offence. The criminal offence is the marriage, coupled with the intent in leaving the country to carry such marriage into effect. To transpose or invert the plain words of the enactment so as to make the substantive and principal act the leaving the Dominion with the intent, coupled with the condition that such intent shall be subsequently effectuated, is to make that a crime which the Legislature has not contemplated.

So far as anything essential to constitute the offence is required to be done out of Canada, it is in my opinion entirely beyond the legislative powers conferred on the Dominion by the British North America Act.

By section 91 sub-section 27 of that Act, power is conferred on the Dominion to legislate on the subject of the criminal law. It is to this power exclusively that the authority of Parliament to enact the Criminal Code must be referred. It is a principle as well of constitutional as of international law, universally recognized, that the power of legislation in constituting offences and enacting punishments and penalties for such offences is *prima facie* local, limited to the territory over which the Legislature has jurisdiction, and does not extend to offences committed beyond its confines. As the Lord Chancellor says in giving the judgment of the Judicial Committee in the case of *Macleod v. The Attorney-General of New South Wales*, [1891] A.C. 458, the rule of law is expressed in the maxim: *Extra territorium jus dicenti impune non paretur*.

In *Jefferys v. Boosey*, 4 H. L. Cas. 926, Baron Parke, in advising the House of Lords, says :

The Legislature has no power over any persons except its own subjects, that is, persons natural born subjects, or resident, or whilst they are within the limits of the kingdom. The Legislature can impose no duties except on them, and when legislating for the benefit of persons must, *prima facie*, be considered to mean the benefit of those who owe obedience to our laws, and whose interests the Legislature is under a correlative obligation to protect.

I may say here that the legislation in question in the case of *Jefferys v. Boosey*, 4 H. L. Cas. 926, was beneficial, and not criminal legislation.

In the case of *Macleod v. The Attorney-General of New South Wales*, [1891] A.C. 458, already referred to, the question under appeal involved the legality of a conviction of the appellant for bigamy for having married without the limits of the colony, whilst a first wife by a legal marriage was alive. The conviction had taken place under a Colonial Act which provides that—

Whosoever being married marries another person during the life of the former husband or wife, wheresoever such second marriage takes place, shall be liable to penal servitude for seven years.

The appeal was decided, not on the ground that the actual legislation, as it was finally interpreted, was beyond the powers of the Legislature, but on the construction of the words "whosoever" and "wheresoever." It was held that inasmuch as the Legislature had no power to make a bigamous marriage contracted beyond its jurisdiction an offence, that consideration made it necessary, in the opinion of the Judicial Committee, to construe the words "whosoever being married," as meaning—

Whosoever being married, and who is amenable at the time of the offence committed to the jurisdiction of the colony of New South Wales.

And to restrict the words "wheresoever" as meaning—

Wheresoever in this colony the offence is created.

The Lord Chancellor, in adopting this construction, reasons thus :

"There is no limit of person according to one construction of 'whosoever,' and the word 'wheresoever' is equally universal in its application. Therefore, if their Lordships construe the statute as it stands and upon the bare words, any person married to any other person, who marries a second time anywhere in the habitable globe, is amenable to the criminal jurisdiction of New South Wales, if he can be caught in that colony. That seems to their Lordships to be an impossible construction of the statute. The colony can have no such jurisdiction, and their Lordships do not desire to attribute to the Colonial Legislature an effort to enlarge their jurisdiction to such an extent as would be inconsistent with the powers committed to a colony, and indeed inconsistent with the most familiar principles of international law."

Then, it is said in the same judgment as regards the constitutional question which would have arisen if the construction which was adopted had not been admissible :

"Their Lordships think it right to add that they are of opinion that if the wider construction had been applicable to the statute, and it was supposed that it was intended thereby to comprehend cases so wide as those insisted on at the bar,

it would have been beyond the jurisdiction of the colony to enact such a law. Their jurisdiction is confined within their own territories, and the maxim which has been more than once quoted, *extra territorium jus dicenti impune non paretur*, would be applicable in this case. \* \* \* \* All crime is local. The jurisdiction over the crime belongs to the country where the crime is committed, and except over her own subjects Her Majesty and the Imperial Legislature have no power whatever."

In the case of *Shields v. Peak*, 8 Can. S.C.R. 579, decided in 1883, the same line of reasoning was adopted as conclusive in favour of a construction of the penal clause in an insolvency Act, which, without limitation in point of locality, made it an offence punishable with fine and imprisonment for an insolvent person to obtain credit. It was held that the statute did not apply to an act committed in England to which the statute would have applied if it had had extra-territorial force. In my judgment, in that case I stated the reasons which led me to a conclusion in all respects the same as that arrived at in the case in the Privy Council, and cited several authorities, including some of those now referred to, in support of my decision. Mr. Justice Henry and Mr. Justice Taschereau also arrived at the same conclusion, and for the same reasons. I adhere in all respects to what was said in *Shields v. Peak*, 8 Can. S.C.R. 579, on the subject now under consideration.

It follows from the authorities stated that standing alone paragraphs (b) and (c) of sub-section 1 of section 275 would be *ultra vires* so far as they apply to the offence of bigamy committed by all persons without any qualification or condition of British allegiance, in any part of the world.

Sub-section 4 of the same section 275, however, requires that in order to the constitution of the offence certain other conditions must concur. First, it is required that the accused person must, in order that he may be indicted for a marriage celebrated without the jurisdiction, have left Canada with intent "to go through such form of marriage." The bare intent by itself does not, according to the statute,

constitute any offence. The crime must be a compound one, consisting in the going through the form of marriage without the jurisdiction, coupled with leaving the Dominion with that intent. Therefore, so far as this proviso goes, the objection pointed out in *Macleod v. The Attorney-General*, [1891] A.C. 455, that the Legislature cannot make an act committed without the jurisdiction criminal, is just as much applicable to the present legislation as to that before the Privy Council in the case cited, as the celebration of the marriage abroad is a necessary ingredient in the crime.

There are, however, two other qualifications; the party indicted must be resident in Canada, and must also be a British subject.

First, as to residence in Canada. It is to be observed that what is required is not domicile, but mere residence within the Dominion. Residence is of course a very different thing from domicile; a subject of a foreign state may well be resident in Canada without having a domicile there; of course such a foreign resident is, so long as he is within the Dominion, as much subject to its laws as if he were a subject, but, upon well-established principles of international law, one whose national character is that of a foreign subject or citizen is not affected, as regards his acts or conduct outside the territorial jurisdiction of the country in which he may happen to be resident, by the criminal legislation of the latter state. Thus, according to the rules prevailing in the system of international law universally adopted by all civilized nations, a resident of a foreign country—by which I mean a country other than that to which he owes allegiance—cannot be criminally prosecuted for an act committed whilst absent from his residence in another country, either in that of his own nationality or any other. Such extra-territorial legislation, though it might bind courts and judges amenable to the domestic law, would not be considered by foreign nations as having any extra-territorial force, and therefore all presumptions must be made against an intention on the part of the Legislature to enact laws in contravention of this principle.



This is indeed recognized by the framers of the Code, for the fourth sub-section does not make residence the only condition required to make a party amenable for the extra-territorial act, but conjoins it with another, namely, that in order to come within the enactment the party must be a British subject. This introduces a question of constitutional law common to the whole Empire, one which it was not necessary to decide in *Macleod v. The Attorney-General*, [1891] A.C. 455, and which is not directly touched upon in the observations which the Lord Chancellor added to the reasons of the Judicial Committee for its actual decision in that case.

The question may, therefore, be thus stated: Has the Legislature of a dependency of the Crown of the United Kingdom the power which is undoubtedly possessed by the Parliament of the Empire, of so regulating the conduct of British subjects, resident within its local jurisdiction, as to constitute an act, committed without that local jurisdiction, a criminal offence?

The legislative authority of the Parliament of the United Kingdom to control the personal conduct of the Queen's subjects, irrespective of their locality, depends altogether upon their allegiance, not upon their residence or domicile, and they remain subject to such legislation so long as they retain their national character as British subjects. Numerous instances of such personal legislation are to be found in the statute-book, such as the statutes of Henry the 8th and George the 4th, and that of the present reign, as regards murder committed by British subjects abroad, also the statute 43 George 3rd, ch. 11, section 6, relating to manslaughter by the same class of persons under like conditions, and enactments making piracy, slave trading and breaches of the Foreign Enlistment Acts criminal, though the offence may be committed on the high seas (even in a foreign vessel) or within the limits of a foreign territory. Such offences are, however, unless jurisdiction is specially conferred on colonial courts, indictable only in England.

As, however, the general rule already mentioned requires the presumption to be made in all cases that criminal legis-

lation is intended to be local, it is essential to the constitution by statute, of personal, ex-territorial, criminal offences of the class mentioned, that they should even in England be made law by express enactment, as otherwise the presumption referred to will operate to restrain the statute by interpretation to the local jurisdiction. This being established as an elementary principle of the constitution by authorities so clear and indubitable that no one treating this question without prejudice can venture to deny it, we are brought to the ulterior question as to whether colonies or dependencies of the Crown, whose constitutions emanate from the Imperial Parliament, also possess this power of so legislating as to make British subjects resident within their jurisdiction criminally amenable for acts committed without their territorial limits. As the Imperial Parliament is a sovereign Legislature, I do not for a moment dispute the proposition that it may confer upon a Colonial Legislature powers in this respect co-equal with its own, by granting it authority to enact the personal liability of all British subjects resident within its jurisdiction, or indeed of all British subjects generally, for crimes committed without the jurisdiction. The question to be dealt with here is not as to the power of Parliament in this respect, but as to whether such authority has actually been conferred.

The powers of the Canadian Parliament to legislate in matters of criminal law are, as has been said, to be found in the British North America Act. It is absurd to say that the recital in the preamble of that Act that the provinces had expressed their desire to be federally united into one Dominion under the Crown of the United Kingdom of Great Britain and Ireland, with a constitution similar in principle to that of the United Kingdom, can have any influence upon the question of legislative jurisdiction involved in the case laid before us. In the first place this is a mere recital in the preamble, not carried out in any enacting clause, and next the words "similar in principle," even if there had been such an enacting clause would have been wholly insufficient to confer upon the Dominion Legislature, called into existence

by the Act, the full and absolute sovereign powers of the Imperial Parliament. This is so apparent that it requires no demonstration.

The answer to the question to be resolved must therefore depend altogether on the construction to be placed upon the language of the 91st section, sub-section 27.

"The criminal law, except the constitution of the courts of criminal jurisdiction, but including the procedure in criminal matters."

Was it intended by this to confer the power to legislate regarding criminal responsibility for the acts of all British subjects, or of all British subjects resident in Canada, though committed without the territory of the Dominion?

I am clearly of opinion that no such power was conferred.

No distinction can be made as regards this question of parliamentary jurisdiction between the Dominion and the smallest colony of the Empire whose constitution and powers of criminal legislation depend on a constitution conferred by the Parliament of the United Kingdom. Notwithstanding the great geographical extent of the Dominion, the number of its population and its importance relatively to other colonies and dependencies, powers of this kind must be interpreted in the same way for all alike. Therefore, if under this grant of power to enact criminal laws, the Legislature of Canada can declare the acts of British subjects in a foreign country to be criminal and penal, any colony which possesses general powers of criminal legislation may do the same, subject only to its enactment not being repugnant to an Imperial Act of Parliament and so coming within the Act 28 & 29 Victoria, chapter 93.

That such a consequence could possibly follow a grant of the authority to legislate in criminal matters, expressed in the general and vague terms of section 91 of the British North America Act, is, in my judgment, entirely inadmissible.

It is out of the question to say that the Legislature of a dependency created by an Imperial statute has sovereign powers of legislation in all personal and extra-territorial matters relating to British subjects resident within its limits

irrespective of express grant. In the case of the national character of residents of alien origin, it has no such power. Personal allegiance is a matter which has always been, and always must be, in the absence of the statutory delegation of its powers, dealt with by the Imperial Parliament. The acquisition of British nationality is a matter upon which the Imperial Parliament has the exclusive right of legislation, although the effect of alienage upon the local tenure of land may well be dealt with by a Colonial Legislature. I think it clear beyond question, therefore, that the power of legislation conferred, as regards criminal law, by section 91, is confined to local offences committed within the Dominion, and does not warrant personal jurisdiction as to matters outside it.

In interpreting an ordinary criminal law constituting a new statutory offence, upon the authorities referred to, English courts have always held that local jurisdiction was alone intended. In order that such a statute might operate upon the acts or conduct of British subjects without the Queen's dominions, an intention to create such personal liability must be actually expressed. If, therefore, the creation of a penal offence is by settled rules of interpretation to be restricted as regards locality, it would seem that on the same principles a grant of power to legislate on the subject of criminal law, to be exercised by a dependent Legislature, should also be so construed. Indeed, the argument in favour of the limitation is far stronger in the latter case than in the former, inasmuch as reasons of good policy, national safety and convenience all concur in favour of retaining all matters of legislation which may in any way tend to conflict with the rights or claims of foreign nations in the hands of the Imperial Government; and everything done within the jurisdiction of a foreign Government must to some extent be a concern of that Government which may give rise to international reclamations upon the Imperial Government.

The statute is no doubt less extensive in its terms than the New South Wales Act would have been if it had received the construction put upon it by the colonial court. I fail, however, to find anything either in that part of the judgment

of the Judicial Committee which embodies the *ratio decidendi*, or in the additional observations of the Lord Chancellor, which gives any countenance to the suggestion that the law there in question would have been held *intra vires* if it had been confined to British subjects resident in the colony. On the contrary, I think the following extract implies that the right of extra-territorial criminal legislation would, if the question had directly arisen under a statute identical with this, have been held to have been *ultra vires*. The Lord Chancellor says :

“All crime is local. The jurisdiction over the crime belongs to the country where the crime is committed, and, except over her own subjects, Her Majesty and the Imperial Legislature have no power whatever.”

In Forsyth's book on Constitutional Law, p. 17, a case is mentioned which was submitted to the law officers of the Crown, then Sir Robert Phillimore, Sir Fitzroy Kelly and Sir Hugh Cairns, as to the power of the Indian Legislative Council to enact a law making Indian native subjects of the Crown liable to indictment and punishment for certain offences committed beyond British jurisdiction.

The two great lawyers last-named considered the legislation was *ultra vires*, whilst Sir R. Phillimore was of the contrary opinion. This opinion, though not of the same weight as a judicial decision, is still, considering the high professional reputation of the great law officers who subscribed it, of considerable authority and more than counterbalances anything which may be derived from the uncertain and indeterminate opinion of Sir J. Harding, Sir Alexander Cockburn and Sir Richard Bethell, given by the same author—Forsyth, p. 24—where they say :

“We conceive that the Colonial Legislature cannot legally exercise its jurisdiction beyond its territorial limits—three miles from the shore—or at the utmost can only do this over persons domiciled in the colony who may offend against its ordinances beyond their limits, but not over other persons.”

Apart altogether from the hesitation to express any definite opinion as to ex-territorial Acts, the very reference to

the term "domicile" in connection with the subject in question shows that this opinion was not fully considered.

"Domicile," so far as I have been able to discover, apart from local residence on the one hand and national allegiance on the other, has nothing to do with criminal law; its effects are altogether of either an international or civil character; its introduction into a question of English constitutional law seems to be confined to this opinion. Without pretending to give anything like a full definition of the consequences and legal effects of domicile, I may say that it is generally confined to questions of civil status, marriage, divorce, contract, civil wrongs, descent, testamentary power and civil jurisdiction, and I have never heard or read that it can be invoked in a question of public constitutional law.

In Hall's *International Law*, 3rd ed. at p. 202, a case is referred to which is not without bearing on the present question. The author says in a note:

"It may be worth while to cite an illustrative instance of improper exercise of jurisdiction. An English sailor on board an American vessel stabbed the mate. On the arrival of the vessel at Calcutta the sailor was handed over to the police for safe-keeping. The commission of the crime having been thus brought to the notice of the authorities, they put the sailor on his trial under an Indian statute giving the courts of the Empire jurisdiction over crimes committed by British subjects on the high seas, even though such crimes should be committed on board a foreign vessel. The Government of the United States complained of this assumption of jurisdiction to the British Government, and the latter expressed its regret that the action of the authorities at Calcutta should have been governed by a view of the law which in the opinion of Her Majesty's Government cannot be supported, as a foreign merchant vessel on the high seas is in the position for legal purposes of foreign territory. This case would appear to have depended upon the incompetency of the Indian Legislature to enact the law in question."

Had the offence created by the act been confined to leaving the Dominion with intent to go through a bigamous

marriage in a foreign country, in which case an act committed in a foreign State, or without the jurisdiction, would not have been essential to the completion of the offence, which would in that case have been wholly local, it would in my opinion have been within the jurisdiction of the Dominion Parliament, but as I have shown above, in the legislation before us the criminal act is the marriage without the jurisdiction preceded by the act of leaving the Dominion with intent to celebrate it.

In addition to those already cited, I refer to the following authorities which appear to have more or less bearing on the questions submitted : Halleck's International Law, 3rd ed. by Baker, vol. 1, p. 207 ; Walker's Science of International Law, p. 231 *et seq.*; Wharton's Digest of International Law, sec. 33 a ; Story's Conflict of Laws, 8th ed. sec. 620 *et seq.*; Wharton's Conflict of Laws, 2nd ed. sec. 823 *et seq.*

My answer to the question propounded must, therefore, agreeing with the judgment of the Ontario Queen's Bench Division in the case of *The Queen v. Plowman*, 25 O.R. 656, be that so much of section 275 of the Criminal Code as is contained in paragraphs (a) and (b) of sub-section 1 standing by themselves is *ultra vires* and void, and that those provisions are not validated by anything contained in sub-section 4 of section 275.

GWYNNE, J.—

The sole question which arises from this reference is, whether or not the Dominion Parliament had jurisdiction to enact the provisions contained in sections 275 and 276 of the Criminal Code. What the sections in substance purport to enact is that, any person who being married and being a British subject resident in Canada leaves Canada with intent to go through a form of marriage in a place out of Canada shall be guilty of an indictable offence to which the Act gives the appropriate name of Bigamy, and upon conviction shall be liable to the punishment by section 276 attached to such offence. Now when we reflect that Her Majesty the Queen permitted her loyal subjects resident in the old provinces in British North

America to devise a scheme for federally erecting these provinces into a wholly new creation, and to frame a constitution for such new creation to which the name of The Dominion of Canada has been given, a name theretofore unknown among the dependencies of the British Empire ; and when we reflect that the constitution so framed, after having been adopted by the Legislatures of the provinces proposed to be so united, was in every clause thoroughly discussed and considered by and between delegates, at Her Majesty's gracious suggestion appointed by Her Majesty's Governments in the said provinces, and Her Majesty's Government in the United Kingdom ; and that when so discussed and considered the terms were finally agreed upon as in the nature of a treaty before ever the constitution so agreed upon was presented by Her Majesty's Government to the Parliament of the United Kingdom for the purpose of legislative adoption ; and when we see in the constitution so agreed upon that it is expressly declared that such constitution is similar in principle to that of the United Kingdom, and, further, that one object of the new creation, the constitution of which was so framed and agreed upon, was to promote the interests of the British Empire, and when we see that it is also therein expressly declared that our gracious Sovereign shall constitute, as she does in the Parliament of the United Kingdom, an integral component part of the Parliament of Canada, which, it is declared, shall consist of The Queen, an Upper House styled a Senate and a House of Commons, I cannot fail to see the manifest intention of the framers of our constitution to have been to give to Her Majesty's subjects constituting the people of Canada a political status infinitely superior to that of a colony—a national existence in fact as an integral portion of the British Empire—having a constitution similar in principle to that of the United Kingdom and a Parliament (of which our gracious Sovereign is a component part as she is of the Parliament of the United Kingdom) with sovereign jurisdiction over all matters placed by the constitution under their control.

Now among these matters so placed under the *sovereign*



control of the Parliament we find "Criminal Law" and "Marriage and Divorce." I confess, it appears to me, that the whole of the proceedings adopted for the purpose of framing the constitution of this Dominion must be designated a sham and a farce—that the object and intent of the framers of that constitution would be completely frustrated, and the hopes of Her Majesty's loyal Canadian subjects who have regarded this new creation of the Dominion of Canada as a mode of introduction, as it were, into the family of nations of a new-born offspring of the British Empire, to be followed by a like introduction of others, and, as a most important step taken towards the accomplishment of Imperial federation, will be utterly disappointed if the Parliament of this great Dominion now extending from ocean to ocean, and embracing within its limits half a continent, and having under its sovereign control all matters relating to marriage and divorce, and criminal law, especially, and to the peace, order and good government of Canada generally, should be held not to have jurisdiction to exercise that control in the terms of sections 275 and 276 of the Criminal Code.

Bordering as Canada does upon several foreign States, in many of which the laws relating to marriage and divorce are loose, demoralizing and degrading to the marriage state, such legislation as is contained in the above sections of the Criminal Code seem to be absolutely essential to the peace, order and good government of Canada, and in particular to the maintenance within the Dominion of the purity and sanctity of the marriage state, and for my part I cannot entertain a doubt that the Parliament of Canada—that is to say, that Her Majesty, by and with the advice and consent of the Senate and House of Commons of Canada—can pass an Act as effectual to affect Her Majesty's subjects who, being married and resident in Canada, go through a form of marriage out of Canada, having left Canada with the intent of going through such form of marriage, fully to the same extent as an Act in like terms passed by the Parliament of the United Kingdom could affect Her Majesty's subjects resident in the United Kingdom, who being married should

go through a form of marriage outside of the United Kingdom having left any part thereof for the purpose of so doing. If the courts of justice should hold otherwise they would, in my opinion, inflict a deadly stab upon the constitution of the Dominion.

SEDGEWICK, J.—

I am of opinion that the sections of the Criminal Code, 1892, referred to in the reference herein, are wholly *intra vires* of the Parliament of Canada, for the reasons stated by my brother King in his written judgment, reserving my right to consider hereafter the question whether any Act of the Parliament of Canada can be held to be *ultra vires* unless in terms repugnant to an Act of the Imperial Parliament or in conflict with the federal provisions of the Constitutional Act, that Act having expressly conferred upon this Dominion a "constitution similar in principle to that of the United Kingdom."

KING, J.—

The question is as to the validity of these clauses in their application to the case where the form of the alleged bigamous marriage is gone through outside of Canada. Unfortunately, the matter is before us *ex parte*.

When the law making power has drawn its lines around a defined combination of act and intent declaring a punishment therefor, it has created a specific crime. It may give the crime a name or not. Bishop, Criminal Law, sec. 776.

Sec. 275, after stating that bigamy is (*inter alia*) the act of a person who being married goes through a form of marriage with any other person in any part of the world, or the act of a person who goes through the form of a marriage in any part of the world with any person whom he or she knows to be married, declares (by sub-sec. 4) that "no person shall be liable to be convicted of bigamy in respect of having gone through a form of marriage in a place not in Canada, unless such person, being a British subject resident in Canada, leaves Canada with intent to go through such form of marriage."

Sec. 276 imposes the punishment.

What is made punishable here, in the case of a form of marriage gone through abroad, is the combination of act and intent involved in having the intent in Canada to do a certain act outside of Canada, and leaving Canada for the purpose of carrying out such intent, and then actually carrying it out. The whole is a compound act, no part of which is an offence without the rest, and each part is an essential ingredient of it.

I assume as axiomatic that it would be valid to enjoin a British subject resident in Canada from leaving the country without a license, or with any particular intent, and to make the doing so an indictable offence. If it be said that this is the same question under another form, as the act of leaving a place is not complete until it is actually left, the answer is that, if so, it shews that the completion of an act outside of Canada does not prevent legislative jurisdiction in reference to the entire act, because it seems really beyond controversy that such an obligation might validly be imposed. But, as the leaving a place happens *eo instanti*, on the passing beyond the dividing line, the act may probably be regarded as an act done in the country which is left.

Then, does it differ in principle if the act of leaving the country with the particular intent is made an offence only if the intent is afterwards carried out, or (which, in a question of things and not of words, is substantially the same) if the combination of fact and intent involved in the whole is regarded, and if what is made the offence is the leaving this country with an intent to do something, and the doing of it afterwards?

If any reasonable construction can be placed upon an act to avoid invalidity, it is proper to do so.

In Bishop on Criminal Law, it is said (sec. 116) that:

"If a material part of any crime is committed upon our soil, though it is the lighter part, legislation with us may properly provide for the punishment of the whole of it here."

In *Macleod v. Attorney-General of New South Wales*, [1891] A.C. 455, the alleged offence was one that was wholly com-

mitted in the foreign country. Further, the enactment in question there was one which, upon the construction unsuccessfully contended for, would have extended as well to the case of foreigners, and to British subjects who were not in the colony at any time before the passing of the Act or commission of the offence, and who in no view could be regarded as amenable to colonial jurisdiction. This was held to be beyond the power of the Colonial Legislature, and the language of the Act was held to be used

“subject to the well-known and well-considered limitation that the Legislature were only legislating for those who were actually within their jurisdiction, and within the limits of the colony.”

But it must be recognized that their Lordships did not merely treat it as a matter of construction :

“Their Lordships think it right to add that they are of opinion that if the wider construction had been applied to the statute, and it was supposed that it was intended thereby to comprehend cases so wide as those insisted on at the bar, it would have been beyond the jurisdiction of the colony to enact such a law. Their jurisdiction is confined within their own territories.”

The report of the argument does not show what cases were insisted on at the bar as being comprehended by the Act. The following passage, however, from the judgment shows that, in order to sustain the indictment, a power to impose extra-territorial obligations on persons not British subjects, or in any way amenable to colonial jurisdiction, was required :

“It appears to their Lordships that the effect of giving the wider interpretation to this statute *necessary to sustain this indictment* would be to comprehend a great deal more than Her Majesty’s subjects, more than any person who may be within the jurisdiction of the colony by any means whatsoever.”

Mr. Newcombe draws attention to the fact, appearing from the report of the case below, that the person there

charged was at the time of the commission of the alleged offence (and probably at the time of the passing of the Colonial Act) a person not domiciled in the colony at all.

As to the propositions that crime is local, and that the jurisdiction over the crime belongs to the country where the crime is committed, these are not intended to be absolute and exclusive, as every State admittedly has a right to impose duties upon its own subjects in a foreign country, a right often exercised by the Imperial Parliament. And further, in the case before us, the crime is not wholly committed in the foreign country, as an act requisite to constitute it must be done in this country. Besides, the act forbidden may or may not be an offence in the other country.

It does not seem reasonable that a British subject who should change his domicile to different colonies should continue to be followed by the criminal law of each colony in which he was successfully domiciled; but on the other hand it seems reasonable and in accordance with considerations of public convenience, and not, as it seems to me, covered by authority to the contrary, that, where a material part of a prohibited act is committed in this country, a British subject domiciled here, and only temporarily absent, might well continue to owe to Her Majesty in relation to her government of Canada an obligation to refrain from the completion of the prohibited conduct whilst absent without any *animus manendi*.

To the extent that the Act covers such cases, I am inclined to think it valid.

GIROUARD, J.—

I am of opinion that the Parliament of Canada had authority to enact articles 275 and 276 of the Criminal Code, for the reasons given by Chancellor Boyd in *Reg. v. Brierly*, [1887] 14 O.R. 525. Dealing with similar enactments, which had been in force in Canada since 1841, (4 & 5 Vict., c. 27, s. 22; Can. Cons. Stat., ch. 91, ss. 29, 30; 32 & 33 Vict., ch. 20, s. 58; R.S.C., ch. 161, s. 4), the learned judge held that the Canadian Parliament, when

acting within the limits prescribed by the Constitutional Act, has and was intended to have plenary powers of legislation, as ample as those of the Imperial Parliament. Among the numerous authorities quoted in his exhaustive judgment is a decision rendered by two eminent judges of the province of Quebec, Rolland and Aylwin, JJ., in *Reg. v. McQuiggan*, [1852] 2 L.C.R. 340. Justices Ferguson and Robertson agreed with him, the former also embodying his views in an elaborate opinion. Since these decisions have been rendered a different conclusion was arrived at in *Reg. v. Plowman*, [1894] 25 O.R. 656. Chief Justice Armour said :

"The Imperial Parliament could enact that it should be a crime for a British subject to go through a form or ceremony of marriage abroad, but it has not done so. The Dominion Parliament, being a subordinate Legislature, has no such power; and that is the effect of the case of *Macleod v. Attorney-General for New South Wales*, [1891] A.C. 455, which covers this case. The second marriage is the offence, and the Dominion Parliament has no power to legislate about such an offence committed in a foreign country."

Falconbridge, J., concurred.

It seems to me that *Macleod v. Attorney-General for New South Wales*, [1891] A.C. 455, is distinguishable from the one contemplated in the Canadian Code. Article 275 of the Code, par. 4, says :

"No person shall be liable to be convicted of bigamy in respect of having gone through a form of marriage in a place not in Canada, unless such a person, being a British subject resident in Canada, leaves Canada with intent to go through such form of marriage."

So far as I can gather from the quotation of the New South Wales statute made by the judicial committee, that statute does not contain any such qualification.

Section 54 enacts that :

"*Whosoever*, being married, marries another person during the life of the former husband or wife, *wheresoever* such second marriage takes place, shall be liable to penal servitude for seven years."

Their Lordships remarked that :

"If they construe that statute as it stands, and upon the bare words, any person married to any other person, who marries a second time anywhere in the habitable globe, is amenable to the criminal jurisdiction of New South Wales, if he can be caught in that colony. That seems to their Lordships to be an impossible construction of the statute ; the colony can have no such jurisdiction."

The decision of the Judicial Committee appears to have turned upon the construction of the words "whosoever" and "wheresoever." *Wheresoever*, said their Lordships, "therefore may be read, wheresoever *in this colony* the offence is committed."

The concluding remarks of the judgment rather support the constitutionality of colonial legislation, like the Canadian Code. Quoting Lord Wensleydale in *Jefferys v. Boosey*, 4 H. L. Cas. 926, they remark :

"The Legislature has no power over any persons except its own subjects, that is, persons natural-born subjects or residents, or whilst they are within the limits of the kingdom. The Legislature can impose no duties except on them, and, when legislating for the benefit of persons, must, *prima facie*, be considered to mean the benefit of those who owe obedience to our laws, and whose interests the Legislature is under a correlative obligation to protect. All crime is local. The jurisdiction over the crime belongs to the country where the crime is committed, and, except over her own subjects, Her Majesty and the Imperial Legislature have no power whatever.

Chief Justice Armour observes that the Imperial Parliament has not yet enacted such a law as the one under consideration. It seems to me that a still more comprehensive statute has been passed by the British Parliament, in the early part of the present century. Section 22 of 9 Geo. IV., ch. 31, re-enacted in 24 & 25 Vict., ch. 100, s. 57, after declaring bigamy to be a felony "whether the second marriage shall have taken place in England *or elsewhere*," declares :

"Provided always that nothing herein contained shall extend to any second marriage, contracted out of England by any other than a subject of His Majesty."

The Canadian statute applies only to a British subject resident in Canada and leaving Canada *with intent to go through such form of marriage*.

The assumption by a state of legislative jurisdiction over certain crimes committed abroad by its subjects is fully recognized in international law. Wheaton, International Law, sect. 113, says :

"By the common law of England, which has been adopted in this respect in the United States, criminal offences are considered as altogether local, and are justifiable only by the courts of that country where the offence is committed. But this principle is peculiar to the jurisprudence of Great Britain and the United States; and even in these two countries it has been frequently disregarded by the positive legislation of each, in the enactment of statutes under which offences committed by a subject or citizen, within the territorial limits of a foreign State, have been made punishable in the courts of that country to which the party owes allegiance, and whose laws he is bound to obey. There is some contrariety in the opinions of different public jurists on this question, but the preponderance of their authority is greatly in favour of the jurisdiction of the courts of the offender's country, in such a case, wherever such jurisdiction is expressly conferred upon those courts by the local laws of that country. This doctrine is also fully confirmed by the international usage and constant legislation of the different States of the European continent, by which crimes in general, or certain specified offences against the municipal code, committed by a citizen subject in a foreign country, are made punishable in the courts of his own."

See also Bowyer's Universal Public Law, pp. 180-182; W. B. Lawrence in La Revue de Droit International, vol. 2, p. 256.

This extra-territorial jurisdiction has been asserted by the British Parliament not only in cases of bigamy, but also as



to several other crimes which are recapitulated in Endlich on the Interpretation of Statutes, p. 234, n. c. ed. 1888, and has been recognized by high judicial authority. The recent case of *The Queen v. Jameson*, [1896] 2 Q.B. 425, is a remarkable one. By s. 11 of the Foreign Enlistment Act, 1870,

"if any person within the limits of Her Majesty's dominions, and without the license of Her Majesty, prepares or fits out any naval or military expedition to proceed against the dominions of any friendly State, the following consequences shall ensue : (1). Every person engaged in such preparation or fitting out, or assisting therein, or employed in any capacity in such expedition, shall be guilty of an offence."

"*Held*, that if there be an unlawful preparation of an expedition by some person within Her Majesty's dominions, any British subject who assists in such preparation will be guilty of an offence even though he renders the assistance from a place outside Her Majesty's dominions."

Lord Chief Justice Russell, of Killowen, said :

"It may be said generally that the area within which a statute is to operate, and the persons against whom it is to operate, are to be gathered from the language and purview of the particular statute. But there may be suggested some general rules ; for instance, if there be nothing which points to a contrary intention the statute will be taken to apply only to the United Kingdom. But whether it be confined to its operation to the United Kingdom, or whether, as is the case here, it be applied to the whole of the Queen's dominions, it will be taken to apply to all the persons in the United Kingdom or in the Queen's dominions, as the case may be, including foreigners who during their residence there owe temporary allegiance to Her Majesty. And, according to its context, it may be taken to apply to the Queen's subjects everywhere, whether within the Queen's dominions or without. One other general canon of construction is this—that if any construction otherwise be possible, an Act will not be construed as applying to foreigners in respect to acts done by them outside the dominion of the sovereign power enacting. That is the rule based on inter-

national law by which one sovereign power is bound to respect the subjects and the rights of all other sovereign powers outside of its own territory. Now apply those considerations to the present case. Sect. 2 provides that "This Act shall extend to all the dominions of Her Majesty." Therefore the preparations mentioned in s. 11, under which this indictment is framed, are preparations made either by subjects of the Queen or by foreigners in any part of the Queen's dominions. And it also seems clear that the provisions of that section were intended to apply to subjects of the Queen wherever they might be, for we must consider the mischief that was aimed at by the Act. I think the objections raised to the ninth and subsequent counts were based on a construction of the statute, both as to the area of its operation and as to the class of persons to whom it is applied, with which I cannot agree. It is no doubt clear that in order to bring a case within s. 11 there must have been a preparation in the Queen's dominions; but I think that, when you have got that fact established, there may be an assistance in such preparation, or an employment of the kind mentioned in the section, outside the Queen's dominions, which will amount to an offence against the Act, if the person rendering such assistance or accepting such employment be a subject of Her Majesty."

Pollock, B., and Hawkins, J., concurred.

It is contended that this power has been conceded to independent States only; in fact Chief Justice Armour admits that "the Imperial Parliament could enact that it be a crime for a British subject to go through a form or ceremony of marriage abroad;" but the learned judge adds that "the Dominion Parliament, being a subordinate Legislature, has no such power." *Subordinate*, in the sense that it is subject to the special laws of the British Parliament, but *omnipotent*, so long as its legislation is not repugnant to that of the Empire. That is the only limit, and it is hardly necessary to remark that, in the present case, the Canadian law is not repugnant to the statutes of the Empire; quite the reverse. A nation has undoubtedly the right to govern

itself by one or more Legislatures ; and when acting within the constitutional limitations, it cannot be said that one is subordinate to the other. All are necessary to secure peace, order and good government throughout the whole Empire. If the Imperial Parliament be silent, the Colonial Legislatures may pass such laws as the good government of that part of the Empire may require, and those laws are just as binding, at least upon British courts, as any statute of the British Parliament. It is not, therefore, surprising that all those laws are enacted in the name of Her Majesty and of the people immediately interested, and as represented in their respective Parliaments.

The internal sovereignty of self-governing British colonies has often been recognized by most eminent Crown law officers and judges of the British courts, both in this country and in England. These opinions and decisions will be found collected in *Reg. v. Brierly*, 14 O.R. 525, and to these the following may be added : Opinions of Sir J. Harding, Queen's Advocate, Sir A. E. Cockburn, Attorney-General, and Sir R. Bethel, Solicitor-General, Forsyth Const. Cases, 24 ; Todd, Parliamentary Government in British Colonies, 159 ; Baron Parke in *Kielley v. Carson*, 4 Moo. P. C. 84 ; *Hodge v. The Queen*, 9 App. Cas. 132 ; Ritchie, C. J., in *Valin v. Langlois*, 3 Can. S. C. R. 16.

The opinion of the Secretary of State for the Colonies of the 17th December, 1869, respecting the validity of "an Act respecting perjury," passed by the Parliament of Canada, may be quoted as adverse to the extra-territorial jurisdiction of the Canadian Parliament in any case. But that Act, as well as the Canadian statute passed in 1861 to give jurisdiction to Canadian magistrates in respect of certain offences committed in New Brunswick by persons afterwards escaping to Canada, contain the same defect as the New South Wales statute. They purport to punish "every person" committing the alleged offence or offences whether a British subject residing in Canada or not.

The semi-sovereign position of the British self-governing colonies has been recognized even by authorities on inter-

national law. Eschbach, *Int. à l'Etude du Droit*, ed. 1856, p. 65, says :

“ Un Etat n'est plus que mi-souverain, quand un autre a acquis contractuellement le droit de s'immiscer dans l'exercice de son gouvernement où de le déterminer dans une partie de ses actes intérieurs ou extérieurs. Pareille restriction affecte surtout la souveraineté extérieure, et le degré s'en détermine par les clauses du traité qui a créé cette semi-dépendance. Un Etat, quoique mi-souverain, n'en est pas moins un Etat ; il continue à pouvoir invoquer directement les principes du droit international, et conserve le droit de traiter, comme puissance indépendante avec les autres Etats, sur tous les points autres que ceux sur lesquels il est tenu à subordination.”

Professor Bluntschli, *Droit Int.* éd. 1896, p. 97, says :

“ Les colonies quoique dépendant politiquement de la métropole, peuvent cependant avoir un certain degré d'indépendance et faire certains actes rentrant dans le domaine du droit international. Le grand éloignement des colonies d'outre-mer rend souvent désirable, dans l'intérêt même de celles-ci, qu'elles aient un gouvernement spécial et jouissent d'une représentation distincte. Quoique à l'origine, la mère-patrie soit seule le siège de la souveraineté, le développement de la colonie exige une plus grande liberté de mouvements. C'est par ce moyen que les colonies arrivent à avoir une vie propre et à s'ériger même en Etats souverains. L'histoire de l'Amérique est très instructive sous ce rapport. Comme exemple de bonne politique coloniale, nous pouvons citer la conduite actuelle de l'Angleterre depuis les réformes de Lord Durham (1836) au Canada et en Australie.”

The policy and conduct of the British authorities upon the Canadian legislation since the passing of the Confederation Act in different matters of international concern, and, among others, extradition of criminals, Chinese emigration, trade tariff, reciprocity with the United States, and trade arrangements with foreign nations, patents and copyright, banking and currency, navigation and coasting trade, shipwrecks, sea-coast fisheries, admiralty, the confirmation of

the treaty of Washington by the Parliament of Canada, etc., demonstrate that Canada, in the eyes of British public law and international law, is no longer to be considered as a mere colonial possession or dependency, but as a component part of the British Empire. They mean that Canada is no longer submitted to the mere dictum of Downing Street, but only to the restrictions of the British Parliament. This clearly results from the language of the British North America Act. The preamble of the Act declares that the provinces now forming the Confederation of Canada

"desire to be federally united into one *Dominion*, under the Crown of the United Kingdom of Great Britain and Ireland, with a constitution similar in principle to that of the United Kingdom."

Section 3 enacts that the provinces "shall form and be one Dominion under the name of Canada."

Section 91 :

"It shall be lawful for the Queen, by and with the advice and consent of the Senate and House of Commons, to make laws for the peace, order and good government of Canada, in relation to all matters not coming within the classes of subjects by this Act assigned exclusively to the Legislatures of the provinces, and for greater certainty, but not so as to restrict the generality of the foregoing terms of this section, it is hereby declared that (notwithstanding anything in this Act) the exclusive legislative authority of the Parliament of Canada extends to all matters coming within the classes of subjects next hereinafter enumerated."

That the word "Dominion" means something more than the word "colony" is made apparent by "the Colonial Habeas Corpus Act, 1862," where the Imperial Parliament uses the two expressions "colony" and "foreign dominion of the Crown."

Section 132 of the British North America Act also says :

"The Parliament and Government of Canada shall have all powers necessary or proper for performing the obligations of Canada, or of any province thereof, as part of the British

Empire, towards foreign countries, arising under the treaties between the Empire and such foreign countries."

By the Confederation Act Amendment Act, 1871, the Parliament of Canada may establish new provinces and provide for their constitution, and even alter the limits of provinces already established, with their consent.

By the Amendment Act of 1875, the Parliament of Canada may confer upon the Senate and House of Commons of Canada "the privileges, immunities and powers" of the British House of Commons.

And, finally, by "An Act to remove doubts as to the validity of Colonial Laws," (28 & 29 Vict., ch. 63) the Imperial Parliament enacts, sec. 2 :

"Any colonial law, which is or shall be repugnant to the provisions of any Act of Parliament extending to the colony to which such law may relate, or repugnant to any order or regulation made under authority of such Act of Parliament, or having in the colony the force or effect of such Act, shall be read subject to such Act, order or regulation, and shall to the extent of such repugnancy, *but not otherwise*, be and remain absolutely void and inoperative."

#### Section 3 :

"No colonial law shall be, or be deemed to have been, void or inoperative on the ground of repugnancy to the law of England, unless the same shall be repugnant to the provisions of some such Act of Parliament, order or regulation, as aforesaid."

#### Notes : *Government Referred Case.*

The value of the opinion of the majority of the court in the above "referred case" is much detracted from by the fact of the dissent of the Right Hon. Sir Henry Strong, Chief Justice of the Court, and since appointed also a member of the Judicial Committee of the Imperial Privy Council. The decision or opinion is not a "judgment," there being no opposing parties, and is for the information of the Governor in Council, and advisory only, 54-55 Vict.,

**Notes :** (*Continued*).

1891 (Can.), c. 25, s. 4. Until the same question, upon which opinions at the Bar are widely divergent, reaches the Judicial Committee of the Privy Council upon an appeal in an opposed case, and is there argued by opposing counsel, and not *ex parte* as was here done, the point of law involved must be considered as unsettled.

By the statute of 1891, 54-55 Vict. (Can.), c. 25, s. 4, the Supreme and Exchequer Courts Act, R.S.C., c. 135, was amended by the substitution in section 37 of the following :

37. Important questions of law or fact touching provincial legislation, or the appellate jurisdiction as to educational matters vested in the Governor in Council by "The British North America Act, 1867," or by any other Act or law, or touching the *constitutionality of any legislation* of the Parliament of Canada, or touching any other matter with reference to which he sees fit to exercise this power, may be referred by the Governor in Council to the Supreme Court for hearing or consideration ; and the court shall thereupon hear and consider the same :

(2) The court shall certify to the Governor in Council, for his information, its opinion on questions so referred, with the reasons therefor, which shall be given in like manner as in the case of a judgment upon an appeal to the said court ; and any judge who differs from the opinion of the majority shall, in like manner, certify his opinion and his reasons ;

(3) In case any such question relates to the constitutional validity of any Act which has heretofore been or shall hereafter be passed by the Legislature of any province, or of any provision in any such Act, or in case for any reason the Government of any province has any special interest in any such question, the Attorney-General of such province, or, in the case of the Northwest Territories, the Lieutenant-Governor thereof, shall be notified of the hearing in order that he may be heard, if he thinks fit :

(4) The court shall have power to direct that any person interested, or, where there is a class of persons interested, any one or more persons as representatives of such class

**Notes : (Continued).**

shall be notified of the hearing upon any reference under this section, and such persons shall be entitled to be heard thereon :

(5) The court may in its discretion request any counsel to argue the case as to any interest which is affected and as to which counsel does not appear, and the reasonable expenses thereby occasioned may be paid by the Minister of Finance and Receiver-General out of any moneys appropriated by Parliament for expenses of litigation :

(6) The opinion of the court upon any such reference, although *advisory only*, shall for all purposes of appeal to Her Majesty in Council be treated as a final judgment of the said court between parties :

(7) General rules and orders with respect to matters coming within the jurisdiction of the court under this section may be made in the same manner and to the same extent as is provided by this Act with respect to other matters within its jurisdiction, and, in particular, such rules and orders as to the judges making them seem best for the investigation of questions of fact involved in any reference thereunder.

***Analogous Imperial Legislation.***

The Imperial Act, 24-25 Vict., c. 100, s. 57, would appear to also include the offence described in sub-section 4 of the Canadian Criminal Code, sec. 275, so that, if the accused were apprehended or in custody in England or Ireland, he might be there tried and punished for the bigamous marriage in a foreign country, although a British subject resident in Canada, who had left Canada with intent to go through such form of marriage. No question of leaving British territory with or without such intent is involved in the Imperial Act, which is as follows :—

(Sec. 57). "Whosoever, being married, shall marry any other person during the life of the former husband or wife, whether the second marriage shall have taken place in England or Ireland, *or elsewhere*, shall be guilty of felony, and, being convicted thereof, shall be liable, at the discretion



**Notes : (Continued).**

of the court, to be kept in penal servitude for any term not exceeding seven years and not less than three years, or to be imprisoned for any term not exceeding two years with or without hard labour; and any such offence may be dealt with, inquired of, tried, determined and punished in any county or place in England or Ireland, *where the offender shall be apprehended* or be in custody, in the same manner in all respects as if the offence had been *actually committed* in that county or place. Provided that nothing in this section contained shall extend to any second marriage contracted elsewhere than in England and Ireland *by any other than a subject* of Her Majesty, or to any person marrying a second time whose husband or wife shall have been continually absent from such person for the space of seven years then last past, and shall not have been known by such person to be living within that time, or shall extend to any person who at the time of such second marriage, shall have been divorced from the bond of the first marriage, or to any person whose former marriage shall have been declared void by the sentence of any court of competent jurisdiction."

## [HIGH COURT OF JUSTICE, ONTARIO.]

BEFORE MACMAHON, J.

THE QUEEN v. DEFRIES.

THE QUEEN v. TAMBLYN.

(25 ONT. REP. 645.)

*Conspiracy—Object of—Civil wrong—Habeas corpus—Controverting Return—Jurisdiction—Cr. Code 394, 752.*

1. Conspiracy to defraud is indictable although the object was to commit a civil wrong, and although if carried out the act agreed upon would not constitute a crime.
2. Where the warrant of arrest embodied in the return to a *habeas corpus*, on its face shews jurisdiction in the magistrate affidavits are not admissible to controvert such fact if the offence charged be a criminal one.
3. A court of one province has no jurisdiction to direct an inquiry before a justice or a judge in another province, and the hearing of further evidence under the Cr. Code, sec. 752, to controvert the allegation of jurisdiction.
4. Cr. Code, sec. 752, is to be applied only to cases where the *habeas corpus* issues in the same province in which the commitment is made.

ARGUED : October 2, 1894.

DECIDED : October 3, 1894.

This was a motion to discharge two prisoners in the above cases on the returns to writs of *habeas corpus* or for a direction for enquiries under R.S.O., ch. 70, sec. 4, or section 752 of the Criminal Code under the circumstances set out in the judgment.

*E. F. B. Johnston*, Q.C., for the motion. An inquiry should be directed under section 752 of the Criminal Code to ascertain the jurisdiction. The return does not shew where the offence was committed. [*McCarthy*, Q.C., who appeared for the Crown. That is merely a clerical error; the return should be amended as the warrant correctly shews it.] The warrant may, on its face, state that the offence was committed in Montreal, but that is only *prima facie* evidence that such allegation is true, and it is not irrebuttable, and it may be shewn to be not true by evidence outside the proceedings appearing on record. The prisoners are entitled to go behind the warrant under R.S.O., ch. 70, sec. 4, and section 752 of

the Code, otherwise those sections would be useless. To displace the warrant the prisoners shew by affidavits they have not been in Montreal, or had any communication with that place for a long time, and cannot be connected with any conspiracy in that city. That fact warrants an inquiry being directed under the statutes. It is more than a question of mere jurisdiction. It involves the question whether on the mere production of Quebec warrants, Ontario residents in such a case can be sent to Quebec for trial without testing the legality of the proceedings. There was no offence committed there by the defendants on the facts as they appear, even admitting there was an offence committed at all. Even if there was communication, the conspiracy, if any, was not in Montreal, but must have taken place in Kingston. The affidavits displace the warrants. The real question is, can the Court, on a return to a writ of *habeas corpus*, enquire into the legality of the warrant on the point of jurisdiction as to the offence alleged? It is submitted this may be done, otherwise there is no redress for persons arrested on false warrants, or warrants issued wholly without jurisdiction.

*W. Mortimer Clark, Q.C.*, with him. The warrants shew no offence within the Code. Permitting persons to pass free on a railroad is not an indictable offence.

*McCarthy, Q.C.*, contra. The return should be amended: *Re Leonard Watson*, 9 A. & E. 731. [MACMAHON, J.—I think I must allow the returns to be amended to conform to the warrants.]

*McCarthy*. The prisoners were arrested on warrants of competent authority properly backed, which shew on their face criminal offences. There is an offence here: Code section 394. The only possible inquiry would be, is the information properly recited in the warrant? Section 554, sub-sec. (b) of the Code gives the magistrate jurisdiction. The offence is a conspiracy to defraud the Grand Trunk Railway Company. If the magistrate had no power to try the offence proved he would send the prisoner before a tribunal which had. Any one may lay the information. Section 558 provides for the information. Section 559 provides for the war-

rant. Section 562 for a summons before the proper magistrate. This is not a question of jurisdiction. It is merely a question of whether there is an information disclosing an indictable offence. There is no jurisdiction here to try that. The English Act 56 Geo. 3, ch. 100, referred to in Short & Mellor's Crown Practice at p. 359, is not applicable to criminal offences. The truth of a return in a criminal case cannot be questioned: 2 Burn's Justices, 945. The affidavits filed should not be read: Short & Mellor, 361. The Ontario statute R.S.O., ch. 70, does not apply to criminal matters.

*Johnston, Q.C.* After the amendment allowed, the Court cannot, of course, be asked to discharge the prisoners, but should direct the inquiry.

MACMAHON, J. :—

In the above cases writs of *habeas corpus* had issued directed to Adolphe Bissonnette, High Constable in and for the District of Montreal, and Eugene P. Flynn, special constable for the Province of Quebec, commanding them to bring up the bodies of Frederick Tamblyn and Samuel Henry Defries, detained in their custody.

On the 2nd day of October the said constables made the following return in the case of the said Samuel Henry Defries: "We, Adolphe Bissonnette, High Constable in and for the District of Montreal, in the Province of Quebec, and Eugene P. Flynn, special constable for the Province of Quebec, in obedience to the writ herewith, do certify and return that before the said writ came to us, that is to say, on Monday, the 1st day of October, 1894, Samuel Henry Defries, in the said writ named, was taken, and in the police station for the city of Toronto, and under our custody is detained by virtue of a warrant issued under the hand and seal of Mathias C. Desnoyers, Esquire, one of the Judges of the Sessions of the Peace for the City of Montreal, in the Province of Quebec, having jurisdiction as a magistrate or justice of the peace in and for the said Province of Quebec; whereby we, as and being constables and peace officers in the District of Montreal aforesaid, were commanded in Her Majesty's name forthwith

to apprehend the said Samuel Henry Defries and others, and to bring them before the said Mathias C. Desnoyers, or some of Her Majesty's justices of the peace in and for the said district, to answer a certain charge which had on the 28th day of September, in the year of Our Lord one thousand eight hundred and ninety-four, been made upon oath before the said Mathias C. Desnoyers, Esquire, Judge of the Sessions of the Peace, acting in and for the District of Montreal, to wit : that the said Samuel Defries and one John Mulligan, one John Stone, one William Lewis and one Frederick Tamblyn did, on or about the 9th day of August, 1894, at the City of Montreal, conspire, combine, confederate and agree together to defraud and injure the Grand Trunk Railway Company of Canada, by allowing certain persons to ride upon some parts of the railroads of said company without paying their fares, against the form of the statute in such case made and provided, and the said warrant was indorsed by Hugh Miller, a justice of the peace in and for the City of Toronto, in the County of York and Province of Ontario, as follows :

" Canada, Province of Ontario, City of Toronto—To wit :

Whereas, proof upon oath has this day been made before me, one of Her Majesty's justices of the peace in and for the said city, that the name of M., C. Desnoyers to the within warrant subscribed is of the handwriting of the justice of the peace within mentioned, I do, therefore, authorize Adolphe Bissonnette, who bringeth me this warrant, and all other persons to whom this warrant was originally directed, or by whom the same may be lawfully executed, and also all constables and other peace officers in the said city to execute the same within the said city.

" Given under my hand this 1st day of October, in the year of Our Lord one thousand eight hundred and ninety-four.

(Sgd.)

" HUGH MILLER, J.P."

A similar return was made to the writ obtained in Frederick Tamblyn's case.

Upon the return being filed, counsel for the respective prisoners moved for their discharge.

I permitted the return to be amended so as to correctly recite the warrant, which alleged that the conspiracy took place in the City of Montreal.

Counsel admitted that the warrant on its face shewed jurisdiction, but contended that they were entitled to traverse the allegation in the warrant that an offence had been committed by the prisoners in Montreal. Upon the motion to discharge the prisoners, the only mode by which such traverse could be made would be by affidavits, or by a direction under section 752 of the Criminal Code, which Mr. Johnston urged should be resorted to in these cases.

A judge could not, upon a return to a *habeas corpus*, where the warrant of arrest on its face shews jurisdiction in the magistrate issuing it, try on affidavit evidence the question as to where the alleged offence was committed, and so as it were, get behind the warrant for the purpose of controverting the return. This may be done where the person is confined otherwise than for some criminal or supposed criminal offence: Short's Crown Office Practice, p. 359; *In re Charles Smith*, 3 H. & N. 227.

If the criminal proceeding provided by R.S.O., ch. 70, sec. 4, is not *ultra vires*, and the proceedings have been instituted in Ontario, the judge before whom the writ of *habeas corpus* is returnable may proceed under that section to examine into the truth of the facts set forth in the return, by affidavit, or other evidence. And under section 5 a *certiorari* may issue requiring the evidence, depositions and conviction, and all proceedings, to be returned into Court.

I am quite satisfied that what a judge may do under secs. 4 and 5 of the Ontario Act was not intended to apply to cases like those now before me, where no preliminary examination has taken place.

Then as to section 752 of the Criminal Code, it provides that wherever any person in custody, charged with an indictable offence, has taken proceedings before a judge or criminal court having jurisdiction in the premises by way of *certiorari*,

*habeas corpus*, or otherwise, to have the legality of his imprisonment inquired into, such judge or Court may, without determining the question, make an order for the further detention of the person accused, and direct the judge or justice under whose warrant he is in custody, or any other judge or justice, to take any proceedings, hear such evidence, or do such further act as in the opinion of the Court or judge may best further the ends of justice.

This section only applies to cases where the *habeas corpus* has issued from a Court of the same province in which the magistrate's warrant of arrest or commitment has issued. A Court or a judge in Ontario would have no jurisdiction over a justice or a judge in the Province of Quebec, whereby the latter could or would be required or compelled "to take any proceedings, hear such evidence," etc. This can only apply where the Court or judge making the direction has power to enforce the carrying out of the order or direction made. A direction or order from a Court or judge here would be unavailing, as it could not be enforced.

The other point urged was that the warrant disclosed no criminal offence; that it is not a crime for a conductor to permit a person to travel on the cars of the railway company without collecting the fare.

The charge against these prisoners is that they conspired with others named, "to defraud and injure the Grand Trunk Railway Company, by allowing certain persons to ride upon some parts of the railroads of the said company without paying their fares."

Section 394 of the Code enacts that "every one is guilty of an indictable offence, and is liable to seven years' imprisonment who conspires with any other person, by deceit or falsehood, or other fraudulent means, to defraud the public or any person," etc. The offence is complete when the unlawful agreement is entered into between the parties, for the conspiring is the essence of the charge, and it is not necessary that any act should be done in pursuance of the unlawful agreement. Even if section 394 was not in existence, and if, as urged by Mr. Clark, there was only a civil wrong done to

the railway company by persons to ride on the railway cars free, yet, as said by Lord Cockburn, C.J., in *The Queen v. James Warburton*, L.R. 1 C.C.R. 274, "A civil wrong was therefore intended to Lister. The facts of this case fall within the rule that when two fraudulently combine, the agreement may be criminal, although if the agreement were carried out no crime would be committed, but a civil wrong only would be inflicted on a third party. In this case, the object of the agreement was, perhaps, not criminal. It is not necessary to decide whether or not it was criminal; it was, however, a conspiracy, as the object was to commit a civil wrong by fraud and false pretences," p. 276.

Section 394 of the Code makes it a crime to conspire by any fraudulent means to defraud any person. If there was a conspiracy to permit persons to travel free on the railway from whom the conductors should collect fares, it would be a conspiracy to defraud the railway company.

On all the grounds urged the application fails, and the prisoners must be remanded to the custody of the officers.

**Notes:** *Habeas Corpus in Ontario.*

The Habeas Corpus Act (Ontario) now R.S.O., 1897, c. 83, is taken from R.S.O., 1887, c. 70, referred to in the principal case, and the latter statute was taken from R.S.O., 1877, c. 70, which is derived from 29-30 Vict., 1866 (Prov. of Canada) c. 45.

The Act of 1866 has not been included in or repealed by the Dominion revision of 1886, and having been passed before Confederation would remain in force as regards matters of criminal law, over which the Dominion Parliament has now jurisdiction, without regard to its inclusion in subsequent revisions of the statutes of Ontario; and except in so far as it may be held to be impliedly repealed by the new provision contained in the Criminal Code of Canada, 1892, may be said to be still in force in Ontario as regards criminal matters.

Section 4 of R.S.O., 1897, c. 83, is as follows:—4. In cases provided for by this Act, though the return to a writ of *habeas corpus* is good and sufficient in law, the court or judge



**Notes :** (*Continued*).

before whom the writ is returnable, may proceed to examine into the truth of the facts set forth in the return, by affidavit or other evidence, and may order and determine touching the discharging, bailing or remanding the party. The preamble of the Act recites the Imp. Act. 31, Car. II, c. 2, "for the better securing the liberty of the subject and for the prevention of imprisonment beyond the seas," and that the provisions of the latter Act "only extend to cases of commitment or detainer for criminal or supposed criminal matter."

Section 1 then directs that where a person is confined or restrained of his liberty (except persons imprisoned for debt, or by process in any action, or by the judgment, conviction or order of a court of record, court of oyer and terminer, or general gaol delivery or court of general sessions of the peace, a judge of the High Court shall upon complaint made, by or on behalf of the person so confined or restrained, if it appears by affidavit, etc., that there is probable and reasonable grounds for the complaint, award at any time a writ of *habeas corpus ad subjiciendum* under the seal of the court directed to the person in whose custody or power the party so confined or restrained is.

Section 3 of the Act of 1866, provided that "in all cases provided for" by the Act although the return to any writ of *habeas corpus* shall be good and sufficient in law, it shall be lawful for the court or for any judge before whom such writ may be returnable to proceed to examine into the truth of the facts set forth in such return, by affidavit or affirmation (in cases where an affirmation is allowed by law) and to do therein as to justice shall appertain; and if upon such return it shall appear doubtful on such examination whether the material facts set forth in the said return, or any of them, be true or not, in such case it shall and may be lawful for the said judge or the court *to let to bail* the said person so confined or restrained upon his or her entering into a recognizance with one or more sureties . . . and any judge before whom such writ shall be returned shall transmit into the same court the said writ and return, together with

**Notes : (Continued).**

such recognizance, affidavits and affirmations, and thereupon it shall and may be lawful for the said court to proceed to examine into the truth of the facts set forth in the return in a summary way, by affidavit or affirmation (in cases where by law affirmation is allowed) and to order and determine touching the discharging, bailing or remanding the party.

It is however provided by sec. 7 of the present Ontario Act that its several provisions shall extend to *all* writs of *habeas corpus* "awarded in pursuance of the said Act passed in England in the 31st year of the reign of King Charles the Second or otherwise" in as ample or beneficial a manner as if such writs and the said cases arising thereon had been hereinbefore specially named and provided for respectively. R.S.O., 1897, c. 83, s. 7.

**Conspiracy.**

In *Commonwealth v. Prius*, 1857, 9 Gray (Mass.) 127, the question was raised as to whether a confederation to procure an over-insurance on stock in trade by false misrepresentations as to its value constituted an indictable offence, and it was there held that it was at most only a civil wrong, it not being a combination to effect an unlawful purpose and no unlawful means by which the purpose was to be effected being set out in the indictment.

A charge of conspiracy to obtain money "by means of false pretences of a loss thereafterward to happen is altogether too general and vague a statement to come within the rules of criminal pleading." Bigelow, J., in *Commonwealth v. Prius*, 1857, 9 Gray (Mass.) 127. And an act lawful in itself is not converted by a malicious or bad motive into an unlawful act so as to make the doer of the act liable even to a civil action. *Allen v. Flood*, 1898, A.C. 1 (H.L.) Although the prosecutor be himself a party to the fraud in that he was induced to think that he was cheating someone else, that will not prevent those who use the device of inducing the man defrauded to think that he is cheating another, from being amenable to punishment. *R. v. Hudson*, Bell C.C. 263.

**Indictment—Form of.**

An indictment charging an agreement to obtain money

with intent to cheat was held good, although the word *conspire* was not used. *R. v. Hamp*, 6 Cox C.C. 167. An indictment charging that two parties named did conspire by false pretences and subtle means and devices to obtain from F. divers large sums of money of the moneys of F., and to cheat and defraud him thereof was held good although the means of the alleged conspiracy were not stated in detail. *R. v. Kenrick*, 1843, 5 Q.B. 49, following *R. v. Gill*, 2 B. and Ald. 204.

*Particulars.*

Lord Denman, C.J., in *Kenrick's* case *supra* said :—

“There have not been wanting occasions when learned judges have expressed regret that a charge so little calculated to inform a defendant of the facts intended to be proved upon him should be considered by the law as well laid. All who have watched the proceedings of courts are aware that there is danger of injustice from calling for a defence against so vague an accusation, and judges of high authority have been desirous of restraining its generality within some reasonable bounds. The ancient form, however, has kept its place and the expedient now employed in practice of furnishing defendants with a particular of the acts charged upon them is probably effectual for preventing surprise and unfair advantages.”

Sec. 616 of the Criminal Code now enacts (sub-section 2) that “No count which charges any false pretence or any fraud or any attempt or *conspiracy by fraudulent means*, shall be deemed insufficient because it does not set out in detail in what the false pretences or the fraud or fraudulent means consisted : Provided that the court may if satisfied as aforesaid, order that the prosecutor shall furnish a particular of the above matters or any of them.

A copy of the particulars is to be given without charge to the accused or his solicitor and shall be entered in the record and the trial shall proceed in all respects as if the indictment had been amended in conformity with same. Cr. Code 617. The court may have regard to the depositions, in determining whether a particular is required or not. Cr. Code 617 (2.)

## [HIGH COURT OF JUSTICE, ONTARIO.]

BEFORE BOYD, C.

## THE QUEEN V. MINES.

(25 ONT. REP. 577.)

*Magistrate—Preliminary enquiry—Substituted charge after conclusion of—Conviction—Habeas Corpus—Invalid return—Cr. Code, 108.*

1. Magistrates conducting a preliminary enquiry in respect of an indictable offence, may not on its conclusion convict of a lesser offence, over which they have summary jurisdiction, although proved by the evidence adduced, if no complaint was laid before them, nor the accused called upon to defend in respect of such lesser offence.
2. A conviction for "procuring" a pistol with intent unlawfully to do injury to another person, is not to be held a sufficient conviction for "having on his person a pistol, etc.," and is bad as not disclosing an offence known to the law.

The Criminal Code of Canada, 1892, provides as follows:—  
108. Every one who has upon his person a pistol or air gun, with intent therewith unlawfully to do injury to any other person is guilty of an offence, and liable, on summary conviction before two justices of the peace to a penalty not exceeding two hundred dollars, and not less than fifty dollars, or to imprisonment for any term not exceeding six months, with or without hard labor.

Motion, on return of a writ of *habeas corpus*, for an order discharging the defendant from custody, under the circumstances set forth in the judgment.

On the 8th October, 1894, the motion was made before BOYD, C., in Chambers.

A. H. Marsh, Q. C., for the defendant. The conviction returned shews no offence known to the law, and the defendant should be discharged forthwith.

No one appeared for the Crown.

Toronto, October 15, 1894.

BOYD, C.—

The return to the *habeas corpus* shews detention on a

warrant of commitment on a charge that the prisoner did "procure a revolver with intent therewith unlawfully to do injury to one J. S." It purports to be based on a conviction under the Code, sec. 108, which makes it matter of summary conviction if one has on his person a pistol with intent therewith unlawfully to do injury to any other person. But the term used in the commitment, "procure," does not mean or may not mean, *personal* use and handling of the weapon; had it said that "he did procure and have in his hand (or upon his person)," then the offence would be well defined. Now a copy of the evidence is before me, and it appears that the weapon was bought and carried and used by the defendant personally, and the magistrates have found the unlawful intent connected therewith. Should I on this information discharge the prisoner? The better course, seeing that the evidence would justify an amended form of conviction, would be to enlarge the matter to give an opportunity to the magistrates, if so advised, to substitute a more accurate conviction according to the facts as proved before them and found by them. This would be permissible according to *Regina v. Lavin*, 12 P. R. 642, inasmuch as there has been no formal return upon a *certiorari*, and the form of conviction now before me is not a finality.

But I am induced not to take this course for this reason: it appears that the magistrates' jurisdiction was founded upon an information charging the defendant with shooting with intent to murder—that is an indictable offence, and they are charged with the duty of investigating that, and committing for trial if they found it proved *prima facie*; but not finding sufficient evidence to warrant this course, they adopted the expedient of seeking to punish the defendant in a short way, under sec. 108 of the Code, for an offence punishable on summary conviction. The jurisdiction invoked was to commit for trial; they, of their own motion, changed this at the close of the case into jurisdiction to convict. That is an unwarrantable course: to convict on a charge not formulated, as to which the evidence was

not addressed, upon which the defendant was not called to make his defence, and as to which no complaint was laid before them.

Therefore, I think it is my duty to act merely on the invalid return to the *habeas corpus*, which shews detention for an offence unknown to the law : *Re Timson*, L. R. 5 Ex. 257 ; and so order the prisoner's discharge.

**Notes :** *Return of amended conviction.*

If the magistrate has done no more than return the conviction in a more formal shape, instead of sending it up in the informal manner in which it was first drawn, and supposing that the facts as they really happened will warrant him in the return in the amended form, it is legal for the magistrate to make such amendment. *R. v. Barker*, 1 East 188 ; *Ex parte Austin*, 1880, 50 L.J. M.C. 8.

The amended conviction must be drawn up before the first has been quashed or the defendant discharged from custody thereunder. *Chancy v. Payne*, 1 Q.B. 712, 6 Dowl. 281.

But if the defendant is remanded upon the first commitment when brought up on *habeas corpus*, and nothing has taken place equivalent to quashing the conviction, an amended conviction may be returned by the magistrate, and it may, if valid in itself, be used as a defence to an action brought against the magistrate for false imprisonment. *Charter v. Graeme*, 1849, 13 Q.B. 216, 234. A mere informality ought not to be the inducement for removing a conviction under *certiorari*, but some substantial defect in the justice and legality of the proceeding itself before the magistrate, and the defendant is not therefore allowed to set up as against the amended conviction that he was induced by the informal conviction to incur expense in suing out a *certiorari*. *R. v. Barker*, 1 East 186.

The corrected statement must be conformable to the facts as they really took place, and the magistrates are liable, if they make a false return. *Paley on Convictions*, 7th Ed. 235 ; *R. v. Simpson*, 10 Mod. 382.

**Notes : (Continued).**

Where the warrant of commitment recited a conviction for an alleged offence in January, 1888, and the conviction returned under a writ of *certiorari* in aid of *habeas corpus* proceedings, properly recited that it was for an offence committed in January, 1887, it was held to be the proper procedure to enlarge the *habeas corpus* proceedings so as to enable the magistrate to file a fresh warrant in conformity with the conviction returned. *R. v. Lavin*, 1888, 12 Ont. Prac. 642 (MacMahon, J.).

It is to be assumed, *prima facie*, that the commitment correctly recites the conviction, and those alleging it to be different are to bring the conviction into court.

*Ex parte Reynolds*, 8 Jurist 192; *Arscott v. Lilley*, 11 Ont. R. 153, 165, 14 Ont. App. 297.

So, if the magistrates are served with notice of motion for a prisoner's discharge from custody on the ground that the commitment set out in the return to writ of *habeas corpus* was bad on the face of it, and although appearing by counsel do not produce the conviction, it is said that the defendant should not be held in custody under a commitment bad upon its face, nor the motion adjourned to give an opportunity to return a valid conviction to accord with which the commitment might be amended. *Re Timson*, 1870, L.R. 5 Exch. 257.

## [COURT OF QUEEN'S BENCH, MANITOBA.]

BEFORE TAYLOR, C.J., KILLAM, J., AND BAIN, J., SITTING  
AS A COURT FOR CROWN CASES RESERVED.

## THE QUEEN v. DOUGLAS.

*Evidence—Admissibility—Former deposition of accused—Canada Evidence Act, secs. 2 and 5—Identity—Proof of.*

1. The Canada Evidence Act, sec. 5, does not apply to exclude evidence given by the accused in a civil proceeding under the jurisdiction of a Provincial Legislature from being used in evidence against him in a subsequent criminal proceeding.
2. The same rule will apply although the examination in the civil proceeding was compulsory.
3. If a party entitled in civil proceedings to be excused from answering questions on the ground that the answers might tend to criminate him does not object to answer, his evidence is deemed to be voluntary.
4. The excuse from answering questions which may tend to criminate himself is only removed by the Canada Evidence Act, secs. 2 and 5, where the witness is being examined in a criminal proceeding, or in some civil proceeding or matter respecting which the Dominion Parliament has authority to determine the admissibility of the evidence.
5. Evidence given by the official stenographer to the effect that the prisoner resembled the party of same name as prisoner, whose depositions he had taken, and that he believed him to be the same man, but could not sufficiently remember to swear positively to his identity, is properly submitted to a jury.

ARGUED : 8th December, 1896.

DECIDED : 23rd December, 1896.

At the Autumn Assizes of the Eastern Judicial District, held on the 3rd day of November, 1896, John S. Douglas was charged under section 368 of the Criminal Code with making an assignment of his property, with intent to defraud his creditors. He was tried for this offence before Dubuc, J., and a jury, and a verdict of guilty was found against him.

During the trial an official stenographer of the Superior Court for the Province of Quebec was examined on behalf of the prosecution, and was asked to testify as to a deposition made by Douglas in a case of *Asher v. Douglas*, pending before the Superior Court, at Montreal, in a civil action,



over the procedure in which the Province of Quebec had jurisdiction.

Counsel for the defence claimed that, under section 5 of The Canada Evidence Act, 1893, 56 Vic., c. 31, the evidence was not admissible, and objected to its being received.

Counsel for the Crown contended that, under section 2 of the Act, this evidence, not being taken in a criminal proceeding, nor in a civil proceeding respecting which the Parliament of Canada had jurisdiction, could not be excluded under section 5 of the said Act.

Dubuc, J., overruled the objection and received the evidence, but reserved the point for the opinion of the Full Court.

When examined as to the identification of the prisoner, the stenographer stated that the prisoner resembled the J. S. Douglas whose deposition he had taken in Montreal, but, as this took place over six months previously, he could not sufficiently remember his face to swear positively that the prisoner was really the same man. He stated, however, that to the best of his knowledge he was the same man ; that he had no doubt he was the same man.

This evidence was objected to by the defence as not sufficiently identifying the prisoner to admit the deposition.

Dubuc, J., admitted the evidence, and, at the request of the defence, also reserved that point for the opinion of the Court.

The questions stated for the opinion of the Court were :

(1) Was the deposition in question admissible in evidence, or should it have been excluded under section 5 of The Canada Evidence Act, 1893 ?

(2) Should the deposition have been excluded on the ground that it was not sufficiently proved that the J. S. Douglas whose said deposition was taken in Montreal was the same man as the prisoner ?

*H. M. Howell, Q.C.*, and *T. L. Metcalfe* for the prisoner. The Crown admits that the examination of the prisoner in Montreal was compulsory ; it was not evidence given by him on his own behalf. It cannot be read on a criminal proceed-

ing. The statute says no person shall "be excused;" see *Reg. v. Madden*, 14 Can. L. T. 505; *Reg. v. Hendershott*, 26 O.R. 678; *Queen v. Buttle*, L.R. 1 C.C. 248. The Court will read into the statute what is necessary to give effect to the statute. If the Legislature compels a witness to answer, then the evidence may be used against him: *Reg. v. Scott, Dears. & B.C.C.* 47; *Queen v. Coote*, L.R. 4 P.C. 599; *Harvard Law Rev.*, vol. 5, p. 24. The onus is on the Crown to show the statement is a voluntary one: *Reg. v. Thompson* [1893], 2 Q.B. 12. Before arrest questions may be asked by the police: *Reg. v. Miller*, 18 Cox C.C. 34; *Reg. v. Male*, 17 Cox C.C. 689; after arrest, they cannot ask questions. The action in Quebec in which the prisoner gave his evidence was on a promissory note; there the Judge was sitting to enforce Dominion law.

*H. A. Maclean* for the Crown. The evidence objected to was admissible before The Canada Evidence Act: *Reg. v. Coote*, L.R. 4 P.C. 599. In *Reg. v. Scott*, D. & B. 47, and *Reg. v. Robinson*, L.R. 1 C.C.R. 80, the evidence of a bankrupt upon an examination where he was bound by law to answer was admitted, and in *Reg. v. Cherry*, 12 Cox C.C. 32, such evidence was admitted, although a promise had been made to the bankrupt before his examination that it should not be used against him. The Canada Evidence Act does not apply to this evidence, as it was given upon an examination of Douglas at Montreal in a *capias* proceeding—which is a civil proceeding regulated by the Quebec Code of Civil Procedure: *Canada Evidence Act*, s. 2. Even if section 2 of The Canada Evidence Act applied to this evidence, the evidence would still be admissible, as Douglas did not claim privilege, and he had a right, according to the law of Quebec, to refuse to answer questions that would incriminate him: *Reg. v. Madden & Bowerman*, 14 Can. L.T. 505. The decision in *Reg. v. Hendershott*, 26 O.R., 678, that privilege need not be claimed, was given at *Nisi Prius*, and without reference to *Reg. v. Madden & Bowerman*. The case of *Reg. v. Buttle*, referred to in *Reg. v. Hendershott*, was decided upon a statute very different in its object and language from

The Canada Evidence Act. The object of The Canada Evidence Act is not to exclude evidence formerly admissible, but merely to enable Courts to elicit all the evidence. The defendant's privilege now is not that he may be excused from answering questions that may incriminate him, but that the answers shall not be used against him. He must claim the privilege, however, or he waives it. With regard to the second point reserved, there was clearly some evidence to go to the jury, and it was for the jury to attach to it what weight they deemed proper.

TAYLOR, C.J.—

The deposition sought to be given in evidence was made in the progress of a civil action depending in the Superior Court of the Province of Quebec, and I do not see how The Canada Evidence Act can apply. That Act by section 2 applies to all criminal proceedings and to all civil proceedings and other matters whatsoever respecting which the Parliament of Canada has jurisdiction. This was an action in a Provincial Court, a civil action over the procedure in which the Province of Quebec has jurisdiction.

On the argument of the case it was admitted by counsel for the Crown that this deposition sought to be given in evidence was made on an examination which was compulsory, and not when the prisoner volunteered to give evidence on his own behalf. But the law of the Province of Quebec as to a witness claiming protection against being required to answer a question where the answer may tend to criminate him is the same as in this Province. See *Code de Procedure Civile*, Art. 274.

In *Reg. v. Coote*, L.R. 4 P.C. 599, on an appeal from Quebec, it was held that the depositions on oath of a witness legally taken are evidence against him, should he be subsequently tried on a criminal charge, except so much of them as consist of answers to questions to which he has objected as tending to criminate him, but which he has been improperly compelled to answer. It was also said that answers given without objection are to be deemed voluntary answers. Here

it does not appear that this prisoner when examined claimed any protection.

In *Reg. v. Hendershott*, 26 O.R. 678, a case decided at the Assizes, Meredith, C.J., held that evidence given by a prisoner on an inquiry before a coroner could not be read against him at his trial. He had not claimed any privilege, but the learned Chief Justice thought that made no difference. He said the cases of *Reg. v. Coote* and *Reg. v. Connolly*, 25 O.R. 151, proceeded upon the ground that, as the law then stood, the person called as a witness had the right to object to answer any question that might criminate him, and that, if he did not object, he waived the privilege, but the statute had made an entire change. Now, no privilege at all exists in a matter to which the statute relates; but when that privilege was taken away, the law also provided that the evidence given shall not be read in evidence against the prisoner in any criminal proceedings.

But the case of *Reg. v. Connolly*, 25 O.R. 151, was decided subsequent to The Canada Evidence Act, although it does not appear whether the evidence sought to be read was taken before or after, and there the Court of Chancery on a case reserved held that statements made by the prisoner when he had been examined as a witness in the Exchequer Court were admissible as evidence against him. Boyd, C. said it was open for him to have claimed protection in the civil proceedings, and then what he said would have been privileged; but, failing this, what he then said was evidence generally against him.

The case of *Reg. v. Madden*, 14 Can. L.T. 505, does not seem to have been cited to Chief Justice Meredith.

That was also a decision of a Divisional Court upon a case reserved. The prisoner was indicted for a conspiracy to defraud, and the Crown offered as evidence a statement which he had made upon oath in a proceeding before a magistrate, and in which he was complainant. On that occasion he was examined on his own behalf, and the statement was made upon his cross-examination. The Court held that as the prisoner did not, so far as the case showed,

assert his privilege before the magistrate, the evidence was receivable.

In my opinion the answer to the first question must be that the evidence was properly admitted.

The second question is, whether the depositions should have been excluded on the ground that it was not sufficiently proved that the person whose deposition was taken in Montreal was the same person as the prisoner. The evidence as to identity is not very clear or definite, but I cannot say there was no evidence to go to the jury. The question was one entirely for them, and there was evidence to be submitted to them with which they were satisfied.

The second question should therefore be answered in the negative.

With these answers to the questions submitted for the opinion of the Court, the conviction must be affirmed.

KILLAM, J.—

The question is whether the depositions of the prisoner, given in a certain cause pending before the Superior Court of the Province of Quebec, should have been allowed in evidence upon his trial in this Province on a criminal charge.

It is claimed, on the prisoner's behalf, that such evidence is excluded by the 5th section of The Canada Evidence Act, 1893, 56 Vic., c. 31.

By the 2nd section of that Act—"This Act shall apply to all criminal proceedings, and to all civil proceedings and other matters over which the Parliament of Canada has jurisdiction in this behalf." And, by the 5th section, "No person shall be excused from answering any question upon the ground that the answer to such question may tend to criminate him . . . : Provided, however, that no evidence so given shall be used or receivable in evidence against such person in any criminal proceeding thereafter instituted against him other than a prosecution for perjury in giving such evidence."

The first part of the 5th section, removing the excuse that an answer might tend to criminate a witness, applies

only where the witness is being examined in a criminal proceeding or in some civil proceeding or matter respecting which the Parliament of Canada has authority to determine the admissibility of the evidence. In proceedings and matters over which the Provincial Legislatures have jurisdiction, it is for these Legislatures to decide what shall excuse a witness from answering questions. And the proviso to the 5th section is applicable only where the first part of the section is applicable. It is only the evidence as to which the Parliament of Canada has removed the previously existing excuse which is not to be given in evidence against the witness.

*Prima facie* the voluntary statements of a party may be used against him on his trial upon a criminal charge. The cases cited in *Reg. v. Coote*, L.R. 4 P.C. 599, show that the statements are none the less voluntary and none the less proper to be used in evidence because made by the accused in giving his evidence before a judicial tribunal.

It was distinctly decided in *Reg. v. Coote* that, where a party entitled to be excused from answering questions on the ground that the answers might tend to criminate him, gives his answers without objection, they are to be deemed to have been given voluntarily and may be used in evidence against him.

By the 7th section of The Canada Evidence Act, 1893, we are authorized to take judicial notice of all the Acts of any Province forming part of Canada, and under this authority we are justified in ascertaining what were the legislative provisions in force in the Province of Quebec, when the prisoner gave his evidence there, upon this question of his right to be excused from answering the questions put to him.

I have not been able to examine all the statutes of the Legislature of Quebec for this purpose, but I have had reference to the Civil Code of 1867, which expressly excuses witnesses from being obliged to give evidence which might tend to criminate them; and as the case already cited also shows that such was the law of that Province when the evidence there in question was given, and no suggestion has

been made by either the Crown or the prisoner that this law has been changed, I think that it should be assumed that it has not been changed.

It should also be presumed that the law was observed when the prisoner was giving his evidence in the Province of Quebec, and that he did not ask to be excused from doing so.

If, then, the cause in the Province of Quebec in which the prisoner's evidence was given was not a criminal proceeding or a civil proceeding or other matter respecting which the Parliament of Canada has jurisdiction to make the enactment in the 5th section of The Canada Evidence Act, 1893, his depositions were competent evidence against him upon his trial on the criminal charge.

I cannot agree with the contention of counsel for the prisoner, that The Canada Evidence Act, 1893, applies to actions upon promissory notes or other subject matters respecting which the Parliament of Canada may similarly make laws. It is the Provincial Legislatures which are to make laws for regulating procedure in civil actions generally in the Provincial Courts, including actions upon bills of exchange and promissory notes, &c.

As the amended case shows that the depositions in question were given by the prisoner in a civil action over which the Provincial Legislature of Quebec had jurisdiction, I think that the answer to the first question should be that the depositions in question were admissible in evidence.

The answer to the second question should be in the negative. The learned Judge was right in submitting it to the jury to determine how far the identity was proved to their satisfaction.

The conviction should be affirmed.

BAIN, J., concurred.

*Conviction affirmed.*

**Notes :** *Prisoner's former deposition as evidence.*

Sec. 2 of the Canada Evidence Act, 1893, 56 Vic. (Can.), c. 31, applies the Act "to all criminal proceedings, and to all civil proceedings, and other matters whatsoever respecting

**Notes : (Continued).**

which the Parliament of Canada has *jurisdiction in this behalf*.

Sec. 5 enacts as follows :—

“ No person shall be excused from answering any question upon the ground that the answer to such question may tend to criminate him, or may tend to establish his liability to a civil proceeding at the instance of the Crown or of any other person : Provided, however, that no evidence so given shall be used or receivable in evidence against such person in any criminal proceeding thereafter instituted against him other than a prosecution for perjury in giving such evidence.

The case of *R. v. Hendershott*, 1895, 26 Ont. R. 678, was a trial for murder, and it was attempted to place in evidence against the prisoner his depositions before the Coroner on an inquest held on the body of the murdered man. It was held by Meredith, C.J., at *Nisi Prius*, that the coroner's court is a criminal court, and, consequently, under the jurisdiction of the Parliament of Canada, and the Canada Evidence Act, sec. 5, having removed any excuse for answering in the coroner's court, whether privilege was claimed or not, the evidence could not be used afterwards against him on the criminal charge.

It was held by the Queen's Bench Divisional Court in *R. v. Madden*, 1894, 14 C.L.T. 505, and *R. v. Williams*, 1897, 28 Ont. R. 583, that to prevent such evidence from being admissible it is necessary for the witness, before answering, to claim that such evidence might tend to criminate him ; but this view is controverted by Boyd, C., and Robertson, J. (Meredith, J., dissenting), sitting in the Chancery Divisional Court, a court of co-ordinate jurisdiction with the Queen's Bench Divisional Court, in the more recent case of *R. v. Hammond*, 1898, 29 Ont. R. 211. In the latter case, it is said that to claim privilege in the coroner's court would be a mere futile form, as the witness could be required under the statute to answer notwithstanding.

The statement made by an accused person before the justice of the peace upon the preliminary enquiry on the



**Notes : (Continued).**

charge may be given in evidence against him upon the trial without further proof thereof, unless it is proved that the justice purporting to have signed the same did not in fact sign the same. Cr. Code, sec. 689.

And depositions taken in the preliminary or other investigation of any charge against any person may be read as evidence in the prosecution of such person for any other offence upon the like proof and in the same manner in all respects, as they may, according to law, be read in the prosecution of the offence with which such person was charged when such depositions were taken. Cr. Code, sec. 668.

***Identity of Person—Proof of.***

It is said that where no particular circumstance tends to raise a question as to the party being the same, even identity of name is in civil cases something from which an inference of identity may be drawn in proof of a signature to a document, but that, in a criminal case, the mere fact that a person of the same name as the prisoner signed a document, or the like, would not be considered sufficient. Russell on Crimes, 6th Ed. (1896), vol. 3, 470 (n).

In the Irish case of *R. v. Ellen Murtagh*, 1854, 6 Cox C.C. 447, the prisoner was indicted for a misdemeanour in making a false declaration before a magistrate. The magistrate, who had taken the declaration, and a clerk from the police office, were examined, and proved that the declaration produced was made by a woman describing herself as Ellen Murtagh, and who signed by making her mark to it, but were unable to identify the prisoner. It was attempted to prove identity by means of alleged admissions in prisoner's examination upon a subsequent statutory inquiry under oath, but such being held inadmissible it was held there was no evidence to support the indictment. (Pennefather, J., and Moore, J.)

A mere opinion expressed by a witness that the body found was that of the murdered man is not evidence. *People v. Wilson*, 3 Parker C.R. (N.Y.) 199.

**Notes : (Continued).**

A witness who had found a mutilated human body of a person he had not previously seen was allowed to testify that the face resembled a photograph produced, and such evidence was held to have been properly submitted to a jury. *Uddersook v. Commonwealth*, 76 Pa. State 340. Proof of identity may be made by shewing a positive recognition of the voice. *Brown v. Commonwealth*, 76 Pa. State 319; *Commonwealth v. Scott*, 123 Mass. 222; *Commonwealth v. Hayes*, 138 Mass. 185.

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[COUNTY COURT OF NEW WESTMINSTER,  
BRITISH COLUMBIA.]

BEFORE BOLE, J.

**THE QUEEN v. WIRTH AND REED.**

*Appeal from two justices in British Columbia—Summary trial without consent—Cr. Code 782 (a.5), 784 (3).*

1. Cr. Code, sec. 784 (3), making the jurisdiction of the magistrate absolute in British Columbia, Prince Edward Island, etc., without the consent of the accused, in cases of summary trial for theft under \$10, etc., under sec. 783, has not the effect of preventing an appeal when two Justices of the Peace exercise the powers of a magistrate under Cr. Code, sec. 782 (a.3) and 782 (a.5).

Appeal from a conviction of the defendants Wirth and Reed by two Justices of the Peace under the Criminal Code of Canada, 1892, sec. 783 (a), for stealing a coat of the value of less than \$10.

The Criminal Code, sec. 782 (a.3), declares that the expression "magistrate" shall, as regards Part LV., which includes secs. 783 and 784, mean and include, unless the context otherwise requires, . . . (3) in the Provinces of Prince Edward Island and British Columbia, and in the District of Keewatin, any two Justices of the Peace sitting together, and any functionary or tribunal having the powers of two Justices of the Peace.

By Stat. Canada, 1895, 58-59 Vict., c. 40, sec. 782 was

amended by adding, after sub-paragraph 4 of paragraph(a), which defines the expression "magistrate," the following sub-paragraph :—

(5) In all the provinces where the defendant is charged with any of the offences mentioned in paragraphs (a) and (f) of section 783, any two Justices of the Peace sitting together, provided that when any offence is tried by virtue of this sub-paragraph an appeal shall lie from a conviction in the same manner as from summary convictions under Part LVIII., and that section 879 and the following sections relating to appeals from such summary convictions shall apply to such appeal.

By sec. 783, whenever any person is charged before a magistrate

(a) with having committed theft, or obtained money or property by false pretences, or unlawfully received stolen property, and the value of the property alleged to have been stolen, obtained or received, does not, in the judgment of the magistrate, exceed ten dollars or . . .

(f) with keeping or being an inmate or habitual frequenter of any disorderly house, house of ill-fame or bawdy-house—

the magistrate may, subject to the provisions hereinafter made, hear and determine the charge in a summary way.

By sec. 784 (3), the jurisdiction of the magistrate in the Provinces of Prince Edward Island and British Columbia, and in the District of Keewatin, under this part is absolute without the consent of the person charged.

*Richard McBride*, for the appeal.

*A. C. Sutton*, contra.

BOLE, Co. J.:—

The defendants herein were convicted before two Justices of the Peace on a charge of theft, the value of the goods stolen being under \$10.00. From this conviction they have appealed, and it is contended that there is no right of appeal in such cases in British Columbia; 58 & 59 Vic., cap. 40,

enacts as follows, by way of amendment to the Criminal Code, 1892 : (quoting the section).

Section 784, by repealing sub-section three thereof, and substituting the following therefor : (quoting the section).

Section 782 of the Code provides for the summary trial of indictable offences before tribunals—differing more or less in the different Provinces, and the amendment of 1895 introducing sub-paragraph (v) at the end of paragraph (a) makes additional provisions for all the Provinces by enacting that the offences mentioned in paragraphs (a) and (f) of section 783, may be tried before two Justices of the Peace, etc., and provides that where such a trial takes place under that sub-paragraph, *i.e.*, before two Justices of the Peace, an appeal shall lie, while the amendment of section 784 is confined to making the jurisdiction of the magistrate in British Columbia absolute without the consent of the person charged ; so it appears to me that whether there is or is not an appeal from any tribunal other than two Justices of the Peace, summarily dealing with the offences mentioned in paragraphs (a) and (f) of section 783, is a matter with respect to which I am not now called on to express an opinion. The defendants in the present case, having been charged with theft under paragraph (a) of section 783, and tried summarily before two Justices of the Peace sitting together, are, in my view, entitled as of right to appeal against their conviction, which appeal is subject to the conditions provided in Part LVIII., and section 879, and following sections of the Criminal Code, 1892, relating to appeals. If there were any doubt on the subject, one cannot help observing that the Criminal Code taken as a whole shews a marked disposition on the part of the Legislature to extend, not curtail, the right of appeal in criminal matters. Furthermore, the interpretation of all Statutes (especially penal ones) should be highly favourable to personal liberty, *Henderson v. Sherborne*, 2 M. & W. 239, and where an equivocal word or ambiguous sentence leaves a reasonable doubt of its meaning, which the canons of interpretation fail to solve, the benefit of the doubt should be given to the subject, and against the Legislature which

has failed to explain itself. *Nicholson v. Fields*, 31 L.J. Exch. 235; *Foley v. Fletcher*, 28 L.J. Exch. 106. Again, in *Scott v. Morley*, 57 L.J.Q.B. 45 (C.A.), BOWEN, L.J., says: "In dealing with the liberty of the subject, one ought not to read into statutes something which is not there, and which would be in derogation of that liberty," in the absence of express and positive words to that effect, and to hold that while defendants tried with their own consent and convicted under paragraphs (a) and (f) of section 783, by two Justices of the Peace, should have the right of appeal, while those who were in British Columbia, etc., tried and convicted without any reference to their consent, and possibly against their will, under the same paragraphs (a) and (f) of the section, have no right of appeal, would, to my mind, be adopting a view at variance with the declared and manifest object of the statute, derogatory to the liberty of the subject, and entirely unwarranted, as far as I can see, by the words of the Act itself. Even were the section open to two constructions, the reasonable one should be adopted and the unreasonable one rejected. *O'Brien v. Cogswell*, 17 Can. S.C.R. 444; *Plumstead Board of Works v. Spackman*, 53 L.J. M.C. 142. I must, therefore, hold that the defendants herein have a right of appeal from the conviction complained of, and am prepared to deal with same if otherwise regularly before me.

*Appeal heard and defendants released  
on their own recognisances.*

## [COURT OF QUEEN'S BENCH, MANITOBA.]

BEFORE TAYLOR, C.J.

## THE QUEEN v. BEALE.

*Certiorari—Grounds of objection—Quashing conviction—Practice—Cr. Code 337.*

1. Objections on account of any omission or mistake in a conviction made by a magistrate must be set forth in the rule *nisi* in *certiorari* proceedings, or the same will not be allowed.
2. A Provincial Legislature has no jurisdiction to confer upon a single judge, concurrently or otherwise, the power to determine matters arising under the Criminal Code, as to which the full court was formerly the proper forum.
3. The Queen's Bench Act (Man.), 1895, does not apply to affect the practice in *certiorari* proceedings, and an application to quash a conviction is to be made by rule *nisi*, and not by notice of motion.

ARGUED : 4th November, 1896.

DECIDED : 17th November, 1896.

This was an application to quash a conviction under section 337 of The Criminal Code. A preliminary objection was taken, that the application should have been made to the Full Court, and that a single judge sitting on a Wednesday under Rule 162 of The Queen's Bench Act, 1895, had no jurisdiction to hear it.

*C. P. Wilson* and *G. W. Baker* for magistrates and complainant. The motion should have been made to the Full Court, a single Judge has no jurisdiction to hear it. The offence was not against a local Act, but under a Dominion Act. The local Act giving a single Judge authority to do Term work cannot apply : *Paley on Convictions* (6th ed.), 456; *Re Boucher*, 4 A.R. 191; *Reg. v. Beemer*, 15 O.R. 266; *Reg. v. Smith*, N.W.T. Rep., vol. 1, pt. 2, p. 1; *Reg. v. McAuley*, 14 O.R. 643. There was no ground taken in the rule for the *certiorari* here, and only grounds taken in the rule can be urged on motion to quash : *Paley*, 457. The proceeding must be by rule *nisi*; the change from rule *nisi* to notice of motion made by the Manitoba Legislature does

not apply to criminal procedure. As to costs, the Court may order same, even when there is no jurisdiction to hear the motion: *Great Northern Committee v. Inett*, 2 Q.B.D. 284.

*G. A. Elliott* for applicant. The practice is not well defined. At one time, in England, applications were made before the Full Court; then jurisdiction was given to a single Judge: *Short and Mellor's Crown Office Pr.* 131. The motion in England is by summons in chambers, or a rule before a single Judge. The practice here has been to hear before a single Judge.

TAYLOR, C.J.—

At one time the practice in England on moving to quash a conviction was that, when the conviction was returned, it was filed in the Crown Office, the case was set down in the Crown paper, and argued on a Crown Paper day. This was in Term. See *Paley on Convictions* (6th ed.), 456; *Ex parte Lord*, 4 D. & L. 405; *Reg. v. Law*, 27 U.C.R. 262. Under the Crown Office Rules of 1886, it would appear that the application may now, in vacation, or when a Divisional Court is not sitting, be made to a single judge.

*Re Boucher*, 4 A.R. (Ont.) 191, was an appeal from an order made by a single judge refusing to discharge a prisoner, and the question of whether the judgment was a judgment of a judge sitting alone for the Court of Queen's Bench, and appealable, came to be considered. The 37 Vic., c. 7, s. 19 (O), enacted that a judge should sit in Open Court every week for the purpose of disposing of all Court business which might be transacted by a single judge, and section 17 enacted that all matters which according to the law or practice prevailing had been heard before the Full Court in Term, were, with certain exceptions, to be heard and disposed of in the first instance by a single judge. The Court held that, in making these special provisions for the transaction of business, the Provincial Legislature was dealing with civil controversies, and that to extend these provisions to such a case as was then before them would be to alter criminal procedure, over which the Provincial Legis-

lature has no jurisdiction. They held that none of these powers conferred upon a single judge made him the equivalent of the Full Court for the purpose of determining whether a person suffering imprisonment under conviction for a criminal offence is entitled to be discharged. In *Reg. v. McAuley*, 14 O.R. 643, it was held that motions to quash convictions must be made to the Court, and that the Ontario Act, even if it did appoint a single judge a Court of criminal jurisdiction, was *ultra vires*. The question was again considered in *Reg. v. Beemer*, 15 O.R. 266, with the same result.

In this Court applications to quash convictions have been made to a single judge and entertained, but in none of them, that I am aware of, has the objection now taken been raised.

In the North-West Territories the objection was raised in *Reg. v. Smith*, N.W.T. Rep., vol. 1, pt. 2, p. 1, and given effect to, the Ontario cases being followed.

My jurisdiction, sitting on a Wednesday, is derived from Rule 162, and I have, under it, power to take all such matters as may properly be brought before a single judge sitting in court. I do not see that an application to quash a conviction under the Criminal Code is one which can be brought before a single judge, or that I can, in the face of the authorities, hold that I have jurisdiction to entertain it. The first rule under the Queen's Bench Act, 1895, expressly provides that nothing in the rules shall be construed as intended to affect the practice or procedure in criminal proceedings. The present application is also open to the objection taken, that it is by notice of motion, and not by rule *nisi* or summons, as Rule 416 does not apply.

It is also said that no ground for moving was specified in the rule for the *certiorari*. This objection would seem fatal, for it is said in *Paley on Convictions* (6th ed.), 457, that no objection on account of any omission or mistake in the order or judgment will be allowed, unless such omission or mistake has been specified in the rule for issuing the *certiorari*.

The motion must be refused with costs. As was said in *Great Northern Committee v. Inett*, 2 Q.B.D. 284, the



respondent has been obliged to come here by the act of the applicant; therefore he is entitled to his costs. A motion similar to the present was made in Chambers and dismissed. It is said that then, or immediately after, the attention of the applicant's solicitor was directed to the objection now taken and which has been successful.

*Motion refused with costs.*

**Note :**

In *Re Boucher*, 1879, 4 Ont. App. 191, it was held that the Administration of Justice Act 1873, Ont. s. 21, and the Administration of Justice Act 1874, secs. 17-20, providing for sittings by a single judge had relation only to civil controversies. Chief Justice Moss in delivering the judgment of the Court said: "To extend these provisions to such a case as the present would be to alter criminal procedure over which the Provincial Legislature has no jurisdiction. The Chief Justice (of the Queen's Bench sitting in single court) of course had jurisdiction to order the issue of the writ of *habeas corpus* and to refuse to discharge the prisoner, but this was by virtue of his judicial office, and not under any of the powers conferred upon a judge by Ontario legislation. None of these made, or *could have made* him the equivalent of the full court for the purpose of determining whether a person suffering imprisonment under a conviction for a criminal offence is entitled to be discharged."

Following the *Boucher* case it was likewise held in *R. v. Beemer*, 1888, 15 Ont. R. 266, by the Queen's Bench Division (Armour, C. J., and Falconbridge, J.,) that the jurisdiction to quash convictions by magistrates was at the time of the passing of the Ontario Judicature Act in the Courts of Queen's Bench and Common Pleas respectively, and was exercisable by them sitting in term only, but an appeal from the refusal of a motion to quash made before a single judge and heard upon the merits was treated as a substantive motion to quash.

## [SUPREME COURT OF NOVA SCOTIA.]

BEFORE TOWNSHEND, J., IN CHAMBERS.

## THE QUEEN V. STAFFORD.

*Bawdy house—Offence of keeping—Imprisonment for non-payment of fine—Limit of—Cr. Code 208, 788, 872 (b).*

1. Upon conviction and fine for keeping a bawdy house the powers of a magistrate for enforcing payment of the fine are limited to directing imprisonment for a period not exceeding three months under Cr. Code., sec. 872 (b), although he might impose imprisonment for six months in the first instance instead of a fine.
2. *Semble*, Sec. 788, Cr. Code, only applies to authorize six months' imprisonment in default of payment of a fine when fine and imprisonment are conjointly imposed in the first instance.
3. Cr. Code sec. 208 only applies to authorize six months' imprisonment when imposed as the substantive punishment for the offence and not as a means of enforcing payment of a fine.

ARGUED : April 5, 1898.

DECIDED : April 6, 1898.

The prisoner Maud Stafford was convicted on February 28th, 1898, before G. H. Fielding, Esquire, Stipendiary Magistrate of the City of Halifax, "for that she the said Maud Stafford, in the said City of Halifax, on the 24th day of February, A.D. 1898, was the keeper of a common bawdy house at Nos. 72 and 74 Albermarle Street, in the City of Halifax," and was adjudged for her said offence to forfeit and pay the sum of \$50 to be paid and applied according to law, and in default of payment of the said sum forthwith she was ordered to be imprisoned in the city prison at Halifax, and there to be kept at hard labor for the space of six months. The Criminal Code provides as follows :

208. Every loose, idle or disorderly person or vagrant is liable on summary conviction to a fine not exceeding *fifty* dollars or to imprisonment with or without hard labor, for any term not exceeding six months, or both.

By sec. 207 (j) every one is a loose, idle or disorderly person or vagrant who . . .

(j) is a keeper or inmate of a disorderly house, bawdy house, or house of ill-fame or house for the resort of prostitutes.

783. Whenever any person is charged before a magistrate . . .

(f) with keeping or being an inmate or habitual frequenter of any disorderly house, house of ill-fame or bawdy house . . . the magistrate may subject to the provisions hereinafter made, hear and determine the charge in a summary way.

788. In any case summarily tried under paragraph (f) . . . of section 783 if the magistrate finds the charge proved, he may convict the person charged and commit him to the common gaol or other place of confinement, there to be imprisoned with or without hard labor for any term not exceeding six months, or may condemn him to pay a fine not exceeding with the costs in the case *one hundred dollars*, or to both fine and imprisonment not exceeding the said sum and term ; and such fine may be levied by warrant of distress under the hand and seal of the magistrate, or the person convicted may be condemned, in addition to any other imprisonment on the same conviction, to be committed to the common gaol or other place of confinement for a further term not exceeding six months unless such fine is sooner paid.

872. Whenever a conviction adjudges a pecuniary penalty or compensation to be paid, or an order requires the payment of a sum of money, whether the Act or law authorizing such conviction or order does or does not provide a mode of raising or levying the penalty, compensation or sum of money or of enforcing the payment thereof, the justice by his conviction or order after adjudging payment of such penalty, compensation, or sum of money with or without costs may order and adjudge . . .

(b) that in default of payment of the said penalty, compensation, sum of money and costs, if any, forthwith or within a limited time, the defendant be imprisoned in the manner and for the time mentioned in the said Act or law or for any period not exceeding three months, *if* the Act or law authorizing the conviction or order does not specify imprisonment, or does not specify any term of imprisonment, unless the said sums with the like costs and expenses are sooner paid.

On April 1st, 1898, *J. J. Power*, for the prisoner, obtained

from Henry, J., a summons for a writ of *habeas corpus*. On its return April 5, 1898, the motion for the writ and for the prisoner's discharge was argued before Townshend, J.

*J. J. Power* for the prisoner. The conviction being had under secs. 207 and 208 of the Criminal Code, three months is the utmost limit of imprisonment which could be imposed. The section or part of the Code to be invoked in order to enforce payment of the fine is 872 (a) or 872 (b), and neither of these authorize the imposition of hard labour in addition to the imprisonment.

*Lenoir*, for the Crown, *contra*. The offence and punishment are both provided for by secs. 783 (f) and 788 Criminal Code, and the latter clause authorizes imprisonment for six months and hard labour, as well for non-payment of a fine as it does by way of punishment in the first instance. There is, therefore, a specification both of imprisonment and the term of imprisonment under 872 (b).

*Power*, in reply. Hard labour is not justified under sec. 788 on imprisonment for non-payment of a *fine*, and, moreover, the penalty must first be distrained for. The charge is not brought under sec. 788, but under secs. 207 and 208. The form of conviction used was WW and not RR, which would indicate that sec. 788 was not the one proceeded under.

HALIFAX, April 6, 1898.

TOWNSHEND, J.—

A writ of *habeas corpus* must go in this case, as the award of punishment by imprisonment for six months in default of payment of the fine imposed is clearly wrong. The reasons are fully explained in the recent judgment of the court in *Reg. v. Horton*, 1898, 34 Can. Law Jour. 42, delivered by Mr. Justice Graham :

This conviction must have been made under sections 207 and 208 of the Criminal Code. Section 208 fixes the penalty, "a fine not exceeding \$50 or to imprisonment, with or without hard labour, not to exceed six months, or to both." The penalty awarded is not in compliance with the

statute. Then, turning to section 872 (b), the powers of the magistrate are fixed for enforcing payment, which is limited to three months if the law authorizing the conviction does not specify any term of imprisonment unless the penalty is sooner paid. The law authorizing the conviction does not specify any term unless the penalty is sooner paid; therefore, the magistrate could only award three months. Here he has imposed six months, undoubtedly in excess of his powers.

I regret to come to this conclusion in the case of such a conviction as the present, and suggest that the attention of the stipendiary magistrate be particularly called to the various provisions of the Code in this respect, which I cannot help remarking are both confusing and misleading. The writ goes, on the terms of no action being brought against any person in respect of the proceedings taken against the defendant or in respect of her detention and imprisonment. No costs allowed.

The formal order of the Court was as follows :—

“ Upon reading the summons for a *habeas corpus* made herein the 1st day of April, 1898, by the Honourable Mr. Justice Henry, and the affidavit and exhibits referred to therein, the affidavit of service of the said summons on Thomas Condon, George H. Fielding and William Murray, and upon hearing Mr. Power for Maud Stafford, and Mr. Lenoir for the Honourable the Attorney-General of Nova Scotia, who intervened on behalf of Her Majesty the Queen, and judgment being given herein this day and on motion,

“ It is ordered that Maud Stafford, now a prisoner in the city prison of the city of Halifax, at Halifax, in the county of Halifax, be forthwith discharged from said prison by William Murray, Esquire, the keeper of said prison, on receipt by him of this order, where she is now detained and imprisoned under a warrant of commitment made and issued by G. H. Fielding, Esquire, Stipendiary Magistrate, in and for the city of Halifax, on the 28th day of February, A.D. 1898, and issued on a conviction made the same day by the said Stipendiary Magistrate against the said Maud Stafford

for being on the 24th day of February, 1898, the keeper of a common bawdy house at 72 and 74 Albermarle Street, in the city of Halifax, whereby the said Maud Stafford was adjudged to forfeit and pay a penalty of \$50.00, and, in default of payment, was to be imprisoned in the said city prison at hard labor for six months.

“And it is further ordered that the said Maud Stafford, as a condition for being discharged under this order, do undertake to bring no action for damages, or otherwise, against any person in respect of the proceedings taken against her and which led to her imprisonment, from which she is hereby discharged, or in respect of her said detention and imprisonment, whether informant, solicitor, stipendiary magistrate, constable, police officer or keeper of the city prison aforesaid, or any other person whomsoever.

“And it is further ordered that there be no costs awarded to the said Maud Stafford for this, her application for discharge from custody.”

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[COURT OF GENERAL SESSIONS FOR THE COUNTY  
OF YORK, ONTARIO.]

BEFORE McDOUGALL, J.

**THE QUEEN v. SAMUEL HOWARTH.**

*Trade Mark—Falsely Applying—Proprietor's Assent—Onus of  
Proof—Cr. Code 446, 447, 710.*

1. On a charge of falsely applying a trade mark the onus of proving that the assent of the proprietor of the trade mark has not been given is upon the prosecution.
2. Criminal Code sec. 710 applies only to cases of forgery of a trade mark and not to cases of “falsely applying,” to shift the onus to the defendant of proving such assent.

Toronto, May 18, 1898.

The defendant was indicted under section 447 of the Criminal Code, 1892, for falsely applying to goods a trade mark without the assent of the proprietor of such trade mark with intent to defraud.

Section 446 (3) enacts that :

Every one is deemed to falsely apply to goods a trade mark or mark who, without the assent of the proprietor of the trade mark, applies such trade mark, or a mark so nearly resembling it as to be calculated to deceive.

Section 447 enacts that :

Every one is guilty of an indictable offence who, with intent to defraud—

(a) forges any trade mark ; or

(b) falsely applies to any goods any trade mark, or any mark so nearly resembling a trade mark as to be calculated to deceive.

No evidence was offered to shew that the proprietor had not assented to the use of the trade mark by the defendant.

*Dewart* for the Crown.

*Allan Cassels* for the defendant.

McDOUGALL, J.—

Under sections 446 and 447 of the Code it is a substantive part of the offence that the application of the trade mark shall be made without the assent of the proprietor.

The onus of proof that such assent has not been given is therefore upon the prosecution, unless sec. 710 applies to shift the onus upon the defendant. The latter section is as follows :

In any prosecution proceeding or trial for any offence under Part xxxiii. relating to fraudulent marks on merchandise if the offence relates to imported goods evidence of the part of shipment shall be *prima facie* evidence of the place or country in which the goods were made or produced.

(2) Provided that in any prosecution for *forging a trade mark* the burden of proof of the assent of the proprietor shall lie on the defendant.

"Forging a trade mark" is defined by section 445 as follows :

445. Every one is deemed to forge a trade mark who either—

(a) without the assent of the proprietor of the trade mark

*makes* that trade mark or a mark so nearly resembling it as to be calculated to deceive ; or

(b) falsifies any genuine trade mark, whether by alteration, addition, effacement, or otherwise.

The offence here charged is not for making or falsifying within that definition but for applying the mark, and therefore section 710 does not apply.

In the Merchandise Marks Act (Imp.) 1887, 50 and 51 Vict., c. 28, sections 4 and 5, there are distinct provisos by which the onus is placed on the defendant in both cases to negative the assent of the proprietor but only one of these provisions, that in Code sec. 710, has been embodied in the Canadian Act. Applying the maxim *expressio unius*, etc., this would indicate that the onus was not intended to be shifted in a case like the present. There is no case to go to the jury and I must direct them to return a verdict of not guilty.

**Note :** *Proprietor's assent—Onus of proof.* <sup>1</sup>

See note to *The Queen v. Authier*, ante p. 73.

*Trade Mark—Resemblance to—“Calculated to deceive.”*

The question as to what resemblance to an already registered trade mark will be a bar to registration under The Trade Marks and Industrial Designs Act (Can.) 54-55 Vict., c. 35, is not the same as that which arises in an action for the infringement of a trade mark ; and it does not follow that, because the person objecting to the registration of a trade mark could not get an injunction against the applicant, the latter is entitled to put his trade mark on the register. *Re Melchers and De-Kuyper*, 1898, 6 Can. Exch. Ct. Rep. 82, 100 ; *Re Speer* 55 L. T. 880 ; *Re Australian Wine Importers* 41 Ch. Div. 278.

The Minister of Agriculture may refuse to register a trade mark . . . (b) if the trade mark proposed for registration is *identical with* or *resembles* a trade mark already registered ; (c) if it appears that the trade mark is *calculated to deceive* or *mislead* the public, 54-55 Vict. (Can.) c. 35, s. 11.

Under that statute it has been held that “if the trade mark proposed to be registered so resembles one already on the register that the owner of the latter is liable to be injured



by the former being passed off as his, then a case is presented in which the proposed trade mark is *calculated to deceive or mislead* the public. Whenever the resemblance between two trade marks is such that one person's goods are sold as those of another the result is that the latter is injured and some one of the public is misled." *Re Melchers and DeKuyper*, 1898, 6 Can. Exch. Ct. Rep. 82, 95. See also *R. v. Authier*, 1897, 1 Can. Cr. Cases, *ante* p. 68.

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[SUPREME COURT OF BRITISH COLUMBIA.]

BEFORE DAVIE, C.J., MCCREIGHT AND WALKEM, JJ., SITTING AS A COURT FOR CROWN CASES RESERVED.

**THE QUEEN v. GARROW AND CREECH.**

*Manslaughter—Attempt to prove abortion—Evidence of cause of death—Sufficiency of—Insufficient post-mortem examination.*

1. In a trial for murder by committing an abortion resulting in the girl's death, it appeared that the *post-mortem* examination was insufficient, and that, so far as the medical evidence was concerned, it was possible that death might have been occasioned by some undiscovered disease which a *post-mortem* examination of other organs than those examined might have disclosed, and none of the medical men would swear positively to the cause of death; but there was other evidence tending to show that death was caused by a criminal operation, and connecting the prisoners therewith. *Held*, that such last-mentioned evidence was properly submitted to the jury.

ARGUED : May 16, 1896.

DECIDED : July 27, 1896.

Case reserved for the Court of Appeal by Davie, C.J., pursuant to section 743 of the Criminal Code, as follows :

At the Victoria Spring Assizes the prisoners were convicted of manslaughter, upon an indictment for having murdered Mary Ellen Janes.

The prisoner Garrow was a physician and surgeon. The prisoner Creech had, for upwards of five years previous to her death, been engaged to be married to the deceased Mary

Ellen Janes, during which time the evidence shewed that, outside of the members of her immediate family, he was her only male companion.

The deceased was of the age of twenty-four years, and lived with her mother and brothers.

On the sixth December, 1895, the deceased complained to her mother of sickness, and the prisoner Creech procured a buggy and took her from home, for the purpose, as he stated to her mother, of going to the family physician, Dr. Frank Hall. Instead of going to the family physician, however, the evidence seems to shew that the prisoner Creech took the girl to the prisoner Garrow, to whom she complained of intractable vomiting. The prisoner Garrow passed an instrument called a "sound" into her *uterus*. He had previously prescribed ergotine for her in three-grain pills, twenty-four in one prescription, to be taken as directed. The prisoner Creech had this prescription made up on 30th November, 1895.

Ergotine is the essence or active principle of the drug ergot, the precise action of which alone, upon the womb, in cases of pregnancy is open to question, some authorities maintaining that it is inert and innocuous, others that it acts in the later but not in the earlier stages, and others again that it acts to a greater or less extent at all times. All authorities, however, are agreed that once uterine action is set up from other causes, the use of ergotine is powerful as an auxiliary in expelling the contents of the womb, and it is also agreed by all medical authorities that the effect of passing an instrument into the *uterus* during pregnancy is to set up uterine action.

On Saturday, 7th December, the prisoner Creech called upon Dr. Frank Hall (who had previously attended the deceased, and who described her as having a tendency towards tuberculosis and anæmia, and of a delicate constitution), and asked Dr. Hall to at once attend her, telling him that she was having a miscarriage, and had been treated by Dr. Garrow, who "had operated upon her." The prisoner Creech also told Dr. Frank Hall that the girl had a piece of flesh protruding from the womb.

Dr. Hall at first refused to have anything to do with the case, but eventually went to see her on the night of Sunday, 8th December.

He found the patient in bed and made a digital examination of the *vagina*, finding a piece of something protruding, "not as big as a hen's egg." He removed it, but without examination. Dr. Hall in his evidence states that what he removed may have been *ovum* or *placenta*, or it may have been mucous membrane of the *uterus*, or an organized blood clot, but, as he did not examine it in any way, he could not say. He also said that *placenta* did not shew itself until the end of the third month of pregnancy.

The symptoms to him pointed to a miscarriage, the girl having been pregnant about six weeks or two months. He was of the opinion that the girl was then suffering from blood-poisoning, caused by a decomposition consequent upon miscarriage, and, after applying due remedies, he left the patient, with instructions to her attendants, her mother and the prisoner Creech, to report to him next day the girl's condition. He would not, however, neither would any of the other medical witnesses state positively that it was a case of miscarriage, or that there was blood-poisoning, or that the girl had even been pregnant.

There was no report the next day, nor until four o'clock a.m. on the following Tuesday, when the prisoner Creech again summoned Dr. Hall, who, together with Dr. Fraser, proceeded to an operation by dilating the *uterus* and scraping it of all foreign substances. In the operation so performed, as also in that of the preceding Sunday, all antiseptic and other precautions usual to such operations were duly observed. Something was scraped out during the latter operation; but whether mucous membrane of the *uterus* or the membrane of pregnancy the surgeons could not say, as they had not examined it, and the difference between these substances could only be determined under the microscope, which was not used.

The operation which they performed is called curetting, and after its performance the *uterus* was duly cleansed and purified, and all proper remedies adopted.

There was no nurse in the room during this operation other than the prisoner Creech, who acted as nurse.

On the Wednesday the girl's condition was worse, and a third physician, Dr. Ernest Hall, was called in. All the physicians diagnosed the case as one of *septicæmia* or blood-poisoning. She died at eight o'clock on Wednesday night.

A *post-mortem* was performed by Dr. John Lang, but was confined to the pelvic organs; and in regard to which the evidence of Dr. Lang was as follows:

"I examined the womb, the ovaries and the fallopian tubes and the broad ligaments. The womb was considerably enlarged; the organ weighed about five ounces, and its cavity measured three and a-half or four inches, as if there had been gestation for two or three months. The womb was empty. The posterior surface of the womb was darkish in appearance; there were also darkish patches on the anterior surface. The interior of the womb was raw-looking and coated with a mucous-like substance, having a somewhat fœtid odour. The lips of the mouth of the womb were thickened; the anterior lip bruised. There was a small wound on the anterior lip and two small wounds on the roof of vagina, such as would be produced by being caught by valcellum forceps (the instrument used in the curetting operation). The ovaries and broad ligaments were normal in appearance; the fallopian tubes were congested; the pelvis was full of a bloody fluid; the body had been injected by the undertaker with fluid before the *post-mortem*, and vitiated the *post-mortem*. I believe the woman had been pregnant. If a recent pregnancy, then two or three months. I saw nothing to account for a miscarriage; the body was well nourished."

Dr. Lang also said, in cross-examination: "I am unable to form any safe conclusion from the *post-mortem* examination. I meant that when I used the phrase 'the *post-mortem* was vitiated.'"

Each of the medical men examined at the trial said that he could not swear positively to the cause of death; that it was possible that death might have been occasioned by some

undiscovered disease, of which, however, there was no indication, but which a *post-mortem* of the other organs might have disclosed.

There was evidence tending to shew that, apart from any criminal intent, the prisoner Garrow had acted with gross negligence and rashness in prescribing ergotine, introducing the "sound," and then leaving the girl without attention.

I read to the jury the sections of the Code bearing upon homicide, and attempts at procuring abortion and miscarriage, and I told them that if death was either occasioned or accelerated by medicines or drugs administered or operations performed by the prisoner Garrow, then he was guilty of manslaughter; if they thought that in prescribing the drug, if that caused or accelerated the death, or performing the operation, if the operation caused or accelerated the death, he acted either with a criminal intention or with any gross negligence.

That regarding the prisoner Creech, he was not concerned with the mere gross negligence or rashness of Garrow. That they could only convict him if they concluded that Garrow's medicines or operation were administered or performed with criminal intent, causing or accelerating death, and that Creech counselled, procured or assisted in administering the drug or performing the operation with the like criminal intent.

I left it to the jury to say whether they were satisfied that the girl came to her death from either the operation or the medicines of the prisoner Garrow, telling them that they must be satisfied that the facts were such as to be inconsistent with any other rational conclusion than that her death was the result of the operation and drugs, or of either of them.

The jury having convicted the prisoners of manslaughter I reserved the question for the opinion of the Court, whether there was in point of law evidence to go to the jury that death resulted from the medicines and operation, or either of them, and in the meantime I deferred sentence and admitted the prisoners to bail.

If, then, the Court should be of opinion that there was evidence in point of law upon which the jury might find that

the death resulted from the criminal acts of the prisoners, or either of them, the conviction is to be affirmed, otherwise to be quashed.

The question was argued before DAVIE, C.J., MCCREIGHT and WALKER, JJ., on 16th May, 1896.

*A. G. Smith*, for the Crown.

*S. P. Mills*, for the prisoner Creech.

*Frank Higgins*, for the prisoner Garrow.

*Cur. adv. vult.*

Victoria, B.C., July 27th, 1896.

MCCREIGHT, J.—

In this case it was contended the evidence of the cause of death was not sufficient, and that the prisoners were not sufficiently proved to have been connected with it. A case of *Reg. v. Morby*, 8 Q.B.D. 571, where a man was indicted for manslaughter in neglecting to procure medical aid for his child, was relied upon, among other authorities, as strongly supporting this view; but in that case no medical man saw the deceased during life. The only medical witness, who had made a *post-mortem*, could say no more than that "in his opinion the chances of life would have been increased by having medical advice; that life might possibly have been prolonged thereby, or indeed might probably have been, but that he could not say that it would, or, indeed, that it would probably have been prolonged thereby."

In the present case, besides the *post-mortem*, the deceased was attended by three medical men, who diagnosed the case as one of blood-poisoning, and one of them stated "that the symptoms pointed to a miscarriage, the girl having been pregnant about six weeks or two months. He was of opinion that the girl was then suffering from blood-poisoning caused by decomposition consequent upon miscarriage," but neither he nor any of the other medical witnesses would state positively that it was a case of miscarriage, or that there was blood-poisoning, or that the girl had even been pregnant.

However, the surrounding circumstances stated in the special case furnish a great deal of light, see Roscoe's Criminal Evidence, 11th Ed., pp. 710, 711, under the title "proof of the means of killing," and corroborate the views of the medical witnesses so distinctly that I think the learned Chief Justice had no choice but to leave the case to the jury.

In *Reg. v. Burton*, Dearsley's Crown Cases, 284, Mr. Justice Maule points out that there is no rule that the *corpus delicti* must "be expressly" proved in every case, though Lord Hale's caution in this respect should be attended to in cases of murder where the disappearance of the supposed murdered man is consistent with his being still alive.

The only question which is left to the Court in this case is whether the case should have been withdrawn from the jury or not, and I do not think it would have been right to withdraw it from them. I may add that I am far from suggesting that they were not warranted in arriving at their verdict, and I think the conviction should be affirmed.

DAVIE, C.J., and WALKEM, J., concurred.

*Conviction affirmed.*

**Note:** *Post-mortem examination.*

The medical practitioner should examine all the important organs for marks of natural disease and note down any unusual pathological appearances or abnormal deviations although they may at the time appear to have no bearing on the cause of death.

Mr. Clark Bell, in his 12th Amer. edition of Taylor's Medical Jurisprudence, 1897, page 23, says: "In medico-legal cases involving questions of life and death, the examination of the body cannot be too thorough and exhaustive; the omission of any one organ is a radical and sometimes a fatal defect. This was well illustrated in 1872 by two leading cases in the United States—that of Mrs. E. G. Wharton, charged with poisoning General Ketchum, and that of Dr. Paul Schoeppe, charged with poisoning Miss Steinnecke. In neither case was the *post-mortem* sufficiently complete."

**Notes :** (*Continued*).

The body is inspected not merely to show that a person has died as a result of the criminal act, but to prove that he has *not* died from any natural cause. Medical practitioners commonly give their attention exclusively to the first point, while lawyers, defending accused parties, very properly direct a most searching examination to the last mentioned point, *i.e.*, the healthy or unhealthy state of those organs which are essential to life. If the cause of death is obscure after the general examination of the body, there is good reason for inspecting the condition of the spinal marrow. In certain obscure cases it may become necessary to institute a microscopic examination, especially of the brain and heart. Taylor's Medical Jurisprudence, 1897, 12th Am. Ed. 23.

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[HIGH COURT OF JUSTICE, ONTARIO.]

BEFORE ROSE J. AND MACMAHON, J.

**THE QUEEN v. FRAWLEY.**

(25 ONT. REP. 431.)

*Conspiracy—Proof of—Single indictment against one conspirator—Cr. Code 64, 394.*

1. A conspiracy to defraud is indictable, although the conspirators have been unsuccessful in carrying out the fraud.
2. One conspirator may be indicted and convicted without joining the others, although living and within the jurisdiction.

This was a case reserved by Michael Houston, Esq., police magistrate for the town of Chatham, for the consideration of the Justices of the Common Pleas Division :—

The defendant Thomas Frawley, of the town of Chatham, in the County of Kent, was, on the 31st day of January, in the year of our Lord 1894, charged before me the undersigned, Michael Houston, police magistrate in and for the town of Chatham, in the County of Kent, for



that he did on or about the 24th day of December, 1892, at the town of Chatham in the said county, unlawfully conspire with one William Irwin, by deceit and falsehood to defraud one James Percy Moore, receiver of the estate of the said Frawley, of the sum of \$200 then due to him and to defeat the action then brought by the said Moore against the said Irwin, by pretending and alleging that the said Irwin had paid the said money to the said Frawley and by the said Frawley giving the said Irwin a receipt therefor, dated the 6th day of December, 1892.

Upon the hearing of the said complaint, to wit, upon the 7th day of February, 1894, the defendant by his counsel consented to the said charge being summarily tried before me, the undersigned, and thereupon pleaded "not guilty" to the said charge, and after hearing the evidence and the argument of counsel I found the prisoner guilty.

The questions for the opinion of the Court are: (1) Is the intent to defraud in this case, although unsuccessful in carrying out the fraud intended, an indictable offence? (2) Can Frawley be tried alone, the other conspirator being known in the county?

In Easter Sittings, June 8th, 1894, before ROSE and MACMAHON, JJ., *McBrady* appeared for the defendant. The offence here was never perfected. There was merely an intent to defraud which was never carried out. Then as to the second point, one person cannot be indicted and tried alone for conspiracy. A conspiracy must be by two persons at least, and two or more must be indicted. One cannot be convicted of conspiracy unless he has been indicted with persons to the jury unknown or since dead: Archbold's Criminal Pleading and Evidence, 21st ed., 1104-1106; Taschereau's Criminal Code, p. 429; *Rex v. Turner*, 13 East 228; Broom's Common Law, 8th ed., 983, note (c); *Regina v. Steinburg*, 8 Legal News 122; *Mulcahy v. The Queen*, L. R. 3 H. L. 306; Wright's Criminal Conspiracies and American Cases, Black ed., pp. 55, 129; Russell on Crimes, 5th ed., vol. 3, p. 125.

*J. R. Cartwright*, Q. C., for the Crown. The offence here

was clearly an indictable offence. The gist of the offence is the conspiring together, and not the actual commission of the fraud which was the subject of the conspiracy : Russell on Crimes, 5th ed., vol. 3, p. 127 ; *Regina v. Mulcahy*, L. R. 3 H. L. 306, at p. 317. The Criminal Code, sec. 64, is clear on the point. It is there laid down that everyone who having an intent to commit an offence does or omits an act for the purpose of accomplishing his object is guilty of an attempt to commit the offence intended whether under the circumstances it was possible to commit such offence or not. The result of the authorities is that one may be indicted and committed for conspiracy so long as the indictment charges that he conspired with another or others. The section 394 of the Code is : "Every one who conspires, etc., not where two or more conspire" : *Regina v. Manning*, 12 Q. B. D. 241 ; *Rex v. Cooke*, 5 B. & C. 538 ; *Regina v. Ahearne*, 6 Cox C. C. 6 ; Russell on Crimes, vol. 3, p. 128, note ; *People v. Olcott*, 2 Johns Cas. N. Y. 300 ; 2 Bishop's Criminal Law, 8th ed., vol. 2, sec. 188.

*McBrady*, in reply. The only exception to one person being indicted is where the other person to the conspiracy is unknown or dead. Here it is admitted that he was known and was alive. Then as to the other point section 64 does not apply, as the alleged offence was before the passing of the Code.

Toronto, June 23rd, 1894.

ROSE, J.—

I read the first question reserved for our opinion as if stated thus : "Is a conspiracy to defraud indictable where the conspirators have been unsuccessful in carrying out the fraud ?" Stating the question thus it answers itself—for a conspiracy is beyond question an indictable offence.

The law is collected in Archbold's Criminal Pleading and Evidence 21st ed., 1087, 1106, *et seq.* ; and Taschereau's Canadian Criminal Acts p. 636. See also *Regina v. Conolly*, 25 O. R. 151.

The case was argued on the supposition that this was what the question meant, and I so deal with it.

The second question I would also answer in the affirmative.

If A. and B. conspire together, each is guilty of an offence, and I see no reason in principle why each may not be indicted separately, tried alone and convicted, although both be living and within the country and county at the time of the indictment, trial and conviction.

And I venture to think that there is no decision to the contrary. The text writers have, I think, been a little careless in their statement of the law, and so have been misleading.

In the Principles of Criminal Law by Harris, 6th ed., at p. 128, it is thus stated: "The gist of the offence is the combination. Of this offence a single person cannot be convicted, unless indeed, he is indicted with others, who are dead or unknown to the jurors": citing 1 Hawk. P. C. ch. 27, sec. 8, p. 448. But what is there said is, "It plainly appears from the words of the statute that one person alone cannot be guilty of a conspiracy within the purport of it from whence it follows, that if all the defendants who are prosecuted for such a conspiracy be acquitted but one, the acquittal of the rest is the acquittal of that one also."

In Archbold's Criminal Pleading and Evidence, 21st ed., 1106, it is said, "But one person alone may be tried for a conspiracy, provided that the indictment charged him with conspiring with others who have not appeared: *Rex v. Kinnersley*, 1 Str. 193, or who are since dead: *Rex v. Niccolls*, 2 Str. 1227." The latter case is better reported in 13 East, p. 412—in a foot note to *Rex v. Inhabitants of Oxford*.

In *Rex v. Kinnersley*, two were indicted for conspiracy together, namely, Kinnersley and Moore. Kinnersley only appeared and pleaded to the indictment and was found guilty. The Court, as is found in the head note, there being no full report of the judgments, held that "if one be convicted, judgment shall be given against him before the

trial of the other." Counsel for the Crown in argument said: "Yet as the matter now stands, Moore, himself, is found guilty, for the conspiracy is found as it is laid, and therefore judgment may be given against one before the trial of the other."

This language, I venture to say, affords the test, viz.: Does the indictment set out the conspiracy in accordance with the fact, so that charging A. with conspiring with B. the jury may, on the evidence, find A. guilty of conspiracy as it is laid? If so, it is good pleading, and the verdict finding the fact as laid in the indictment the conviction will be good. Whether A. be indicted alone or with B., it will of course be necessary to aver and prove that A. and B. did conspire together; and if that be not averred, the pleading would, of course be bad, and if it be not proven there could be no conviction of A. if indicted alone, or of either if indicted together.

In *Rex v. Nichols*, 13 East 412 note, it is thus stated: "The defendant was indicted for a conspiracy at Hick's Hall. The jury found him guilty of a conspiracy with one Bygrave. They likewise found that Bygrave died before this indictment was found." Lee, C.J., said at p. 413: "It is certain that in all conspiracies there must be two at least, or no indictment will lie; and therefore if one be acquitted, the other cannot be guilty. But that case differs; because one being acquitted on record, the conviction of his companion on the same record must be directly repugnant and contradictory to the other. But there can be no contradiction in the present case, any more than where one of the conspirators refuses to come in; yet judgment may be given against him."

The text in the 5th ed. of Russell on Crimes, at p. 127, is more accurate and does not suggest that one may not be indicted alone if it be averred that he conspired with another not found in the indictment.

I do not see how the argument is advanced by considering an indictment where the conspiracy is stated to have been between A. and B. and many other persons, or

between A., B., and persons to the jurors unknown, because with such pleadings the 'discovery must be proved as laid. See *Regina v. Thompson*, 5 Cox C. C. 168; and *Regina v. Manning*, 12 Q. B. D. 241.

In *Regina v. Thompson*, A., B. and C. were charged with conspiring together, and with divers other persons to the jurors unknown. No evidence was offered affecting any other persons than A. B. and C. The jury found A. guilty, but acquitted B. and C., being of opinion that either B. or C. was guilty, but not being able to determine which of the two. *Held*, Erle, J., dissenting, that the verdict was inconsistent, and that A. was entitled to an acquittal.

That case shews that the conspiracy charged must be proved. 2. That to charge a conspiracy between one or more and others unknown will not assist unless evidence be given that the conspiracy was with persons unknown.

These cases are certainly no authority for saying that it aids the indictment to charge a conspiracy with persons unknown unless that be in accordance with the fact.

If, therefore, two conspiring together, each be guilty of an offence, and one alone may be tried and convicted on an indictment charging both, though the other does not appear and plead, and one alone may be tried and convicted on an indictment against him alone, the other being dead, I see no reason why one may not be indicted, tried and convicted alone as long as the indictment sets out a conspiracy in which he was a conspirator, whether such conspiracy be between him and one other or others known or unknown, and whether the other conspirators be or be not alive, or within or not within the county or country.

I have answered this question as if it had been: "Can Frawley be tried alone on an indictment against him only charging him with conspiracy with another to defraud, etc., the other conspirator being known in the country?" *Regina v. Connolly*, 25 O. R. 151, may be referred to also as to the form of pleading.

There must be judgment for the Crown.

MACMAHON, J.—

What constitutes the crime of conspiracy is clearly and concisely stated in the opinion delivered by the Judges through Lord Chief Justice Tindal to the House of Lords in *O'Connell v. The Queen*, 11 Cl. & F. 155, at p. 233, taking the law from two very old cases of *Regina v. Best*, 1 Salk. 174, and *Rex v. Edwards*, 8 Mod. 320, as follows:—"The crime of conspiracy is complete if two, or more than two, should agree to do an illegal thing; that is, to effect something in itself unlawful, or to effect, by unlawful means, something in itself which may be indifferent or even lawful. That it was an offence known to the common law, and not first created by the 33 Edward I., is manifest. That statute speaks of conspiracy as a term at that time well known to the law, and professes only to be 'a definition of conspirators.' It has accordingly been always held to be the law that the gist of the offence of conspiracy is the bare engagement and association to break the law, whether any act be done in pursuance thereof by the conspirators or not." And in Chitty's Criminal Law, vol. 3, p. 1140, it is said: "In every case that can be adduced of conspiracy, the offence depends on the unlawful agreement, and not on the act which follows it; the latter is but evidence of the former." Citing *Rex v. Rispal*, 3 Burr. at p. 1321. And Mr. Justice Willes in answering the questions submitted to the Judges by the House of Lords in *Mulcahy v. The Queen*, L. R., 3 H. L. 306, at p. 317, thus defined the offence: "A conspiracy consists not merely in the intention of two or more, but in the agreement of two or more to do an unlawful act, or to do a lawful act by unlawful means."

The magistrate states he convicted the defendant of the offence charged against him, which was for "unlawfully conspiring with one William Irwin, by deceit and falsehood to defraud one James Percy Moore." He (the magistrate) sends with the reserved case the evidence taken before him, but there being no reservation as to the sufficiency of the evidence upon which the conviction

took place, we are not concerned with it further than to know that evidence was given to shew that the defendant, Frawley, and William Irwin had agreed to defraud Moore, and in order to prove the agreement or conspiracy to defraud, certain overt acts were given in evidence. The "attempt" to carry out the agreement to defraud Moore failed, and we are only concerned with it to the extent stated because of the use of the word "intent" in the first question submitted in place of the word "attempt," as otherwise we might have considered it necessary to return the reserved case for amendment. Besides which the question itself indicates that an unsuccessful "attempt" had been made to carry out the fraud.

The first question must be answered in the affirmative.

As to the second question reserved.

"A conspiracy must be by two persons at least; one cannot be convicted of it unless he have been indicted for conspiracy with persons to the jurors unknown": Archbold's Criminal Pleading and Evidence, 21st ed., 1106. And Warburton's Criminal Cases, at p. 85, thus states the law: "One person alone may be tried for conspiracy provided the indictment charges him with conspiracy with others who have not appeared or who are since dead: *Rex v. Kinnersley*, 1 Str. 193; and *Rex v. Niccolls*, 2 Str. 1227; and one of several prisoners indicted for conspiracy may be tried separately, and upon conviction, judgment may be passed on him, although the others who have appeared and pleaded have not been tried."

The law is laid down in like terms in Wharton's Criminal Law, 9th ed., vol. 2, sec. 1388; and in Chitty's Criminal Law, vol. 3, he says, at p. 1141: "And it is holden, that if all the defendants mentioned in the indictment, except one, are acquitted, and it is not stated as a conspiracy with certain persons unknown, the conviction of the single defendant will be invalid, and no judgment can be passed upon him."

Reading the text of these authorities on criminal law, and even from an examination of some of the cases upon

which the text is founded, the impression conveyed was that unless two were charged in the indictment the indictment would be bad. However, after a perusal of the case of *Rex v. Nichols*, as reported in a note in 13 East, at p. 412, I regard it as properly interpreting the law on the question raised. The defendant was indicted for a conspiracy, and the jury found him guilty of a conspiracy with one Bygrave. They likewise found that Bygrave died before the indictment was found. The indictment was removed into the Court of King's Bench by *certiorari*, and Lee, C. J., said, at p. 415, note: "As to the point of law, it is clear from the cases that have been cited, that the Court will be well warranted in giving judgment against the defendant." See also the judgment of Holroyd, J., in *Regina v. Cooke*, 5 B. & C. 538, at p. 545, cited by Mr. Cartwright.

The answer to the second question must be in the affirmative.

The Crown is therefore entitled to judgment.

#### **Notes : Criminal Conspiracy—Nature of.**

An agreement between two or more persons for any of the purposes following will constitute criminal conspiracy :

1. Falsely to charge another with a crime punishable by law, either from a malicious or vindictive motive or feeling toward the party, or for the purpose of extorting money from him.

2. Wrongfully to injure or prejudice a third person or any body of men, in any other manner.

3. To commit any offence punishable by law.

4. To do any act with intent to pervert the course of justice. Archbold's Crim. Pleadg. (1893) 21st Ed., 1100.

The existence of a bad motive in the case of an act which is not in itself illegal will not convert that act into a civil wrong for which reparation is due. A wrongful act done knowingly and with a view to its injurious consequences may in the sense of law be malicious ; but such malice derives its essential character from the circumstance that the act done constitutes a violation of the law. *Allen v. Flood*, 1898, A.C.



1, per Lord Watson at p. 92. In order to constitute legal malice the act done must, apart from bad motive, amount to a violation of law. *Ibid.*

*Intention and agreement.*

A conspiracy consists not merely in the intention of two or more, but in the agreement of two or more to do an unlawful act, or to do a lawful act by unlawful means. So long as such a design rests in *intention only*, it is not indictable. But where two agree to carry it into effect, the very plot is an act in itself and is the act of each of the parties, promise against promise, *actus contra actum*, capable of being enforced if lawful, punishable if for a criminal object or for the use of criminal means. *Mulcahy v. R.*, L.R. 3 H.L., Eng. & Ir. App. 306, 317, Archbold's Crim. Evid., 21st Ed. 1104.

The conspiracy itself is the offence, and whether anything has been done in pursuance of it or not is immaterial. *R. v. Gill*, 2 B. & Ald. 204; *R. v. Seward*, 1 A. & E. 706; *R. v. Richardson*, 1 M. & Rob. 402; *R. v. Kenrick*, 5 Q. B. 49.

An indictment for a conspiracy may be tried in any county in which an overt act has been committed in pursuance of the original illegal combination and design, *R. v. Connolly*, 1894, 25 Ont. R. 151, 169.

The date mentioned in the indictment as the day when the conspiracy took place is not material, but in form some day before the indictment preferred, must be laid; evidence is not thereby precluded in respect of an earlier date, *R. v. Charnock*, 12 Howard's State Trials, 1397.

*Evidence.*

It is not necessary to prove that the defendants actually met together and concerted the proceeding; it is sufficient if the jury are satisfied from the defendants' conduct either together or severally, that they were acting in concert. *R. v. Fellowes*, 1859, 19 U. C. R., 48, 58. And conspiracy to defraud is indictable although the object was to commit a civil wrong only. *R. v. Defries*, 1894, *ante* 207.

*Particulars.*

See note to *The Queen v. Defries*, *ante* 216.

## [SUPREME COURT OF BRITISH COLUMBIA.]

BEFORE DAVIE, C.J., CREASE, McCREIGHT, WALKEM AND  
DRAKE, JJ., SITTING AS A COURT FOR  
CROWN CASES RESERVED.

## THE QUEEN v. BLYTHE.

*Abduction—Father's possession necessary at time of taking—*

*De facto possession—Prior abandonment by daughter—*

*Letters as acts of persuasion—Extra-territorial*

*inducement to leave—Cr. Code 283.*

1. To constitute the crime of abducting a girl out of the possession of and against the will of her father under Cr. Code, sec. 283, there must be an actual or constructive possession *de facto*, in the father at the time of the taking.
2. When the girl who was resident with her father in a foreign country left without his consent and with intent to renounce his protection, and came to Canada, the father's possession ceased, and, *semble*, a possession *de jure* afterwards established by his following her to the place of flight is not the possession contemplated by Cr. Code, sec. 283.
3. If the persuasion to leave and to remain away operated wholly in the foreign country, there is no jurisdiction to convict in Canada, as persuasion is a necessary element in such cases of abduction.

ARGUED : August 7th and 9th, 1895.

DECIDED : August 26th, 1895.

Section 283 of the Criminal Code, 1892, provides as follows :—

283. Everyone is guilty of an indictable offence, and liable to five years' imprisonment, who unlawfully takes or causes to be taken any unmarried girl, being under the age of sixteen years, out of the possession and against the will of her father or mother, or of any other person having the lawful care or charge of her.

(2). It is immaterial whether the girl is taken with her own consent or at her own suggestion or not.

(3). It is immaterial whether or not the offender believed the girl to be of or above the age of sixteen.

Case stated for the opinion of the Court of Criminal

Appeal, pursuant to section 743 of the Criminal Code, by Davie, C.J., as follows :

1. The prisoner appeared before me on the 24th July, 1895, having elected to take a speedy trial, upon a charge of having, on the 10th July, 1895, at the City of Victoria, unlawfully caused to be taken a certain unmarried girl, to wit, one Belle Rockwood, being under the age of sixteen years, out of the possession and against the will of her father, Eugene Rockwood, contrary to section 283 of the Code.

2. Belle Rockwood, an unmarried girl, who was fifteen years old on the 17th October last past, resided with her father and mother at Port Hadlock, in the State of Washington, one of the United States of America. The prisoner became acquainted with her there, and after such acquaintance came to reside at Victoria, British Columbia ; and, whilst here, opened up a correspondence with the said Belle Rockwood, whilst she was still living with her parents at Port Hadlock aforesaid, urging her, in his letters, to come over here and join him. Belle Rockwood, in reply, wrote letters consenting to come, and finally the prisoner sent her the necessary means to bring her here. Port Hadlock is distant about seven miles by water communication from Port Townsend ; a steamer runs from there to Port Townsend daily, connecting with steamer to Victoria, arriving at the latter place the same day.

3. By her own inclination, and influenced by the letters the prisoner had written her, the said Belle Rockwood left her home on the 10th July, 1895, with the intention of joining the prisoner at Victoria. She travelled on the steamer *City of Kingston* from Port Townsend to Victoria, and the prisoner met her on the arrival of the steamer at the warehouse at Victoria.

4. As they walked together from the steamer, the prisoner asked the girl to think seriously of her father, mother and sister ; that it was not too late ; the steamer returned that evening, and if she wanted to go back she was at perfect liberty to do so. Belle Rockwood's reply was that she would

rather stay with the prisoner. The prisoner then took the girl to a restaurant, and afterwards to a house on the Esquimalt Road kept by some people named Hunt, to whom he introduced the girl as his wife ; and, as such, the prisoner and the girl occupied the same apartment that night.

5. The prisoner was arrested the following day on the charge of abduction.

6. Upon these facts, I was of opinion that no abduction took place before the prisoner and the girl met at Victoria, but that the offence was committed when, after the meeting at Victoria, the prisoner took the girl to the restaurant and afterwards to the Esquimalt Road. I consequently convicted the prisoner and sentenced him to five years' imprisonment in the penitentiary ; but after the sentence, at the request of the prisoner, I agreed to state this case for the Court of Appeal, and in the meantime I respited the execution of the sentence and committed the prisoner to gaol.

If the Court shall be of opinion that no offence was committed by the prisoner over which the Courts of this Province had territorial jurisdiction, the conviction must be quashed ; otherwise, it is to be affirmed.

The question was argued before Davie, C.J., Crease, McCreight, Walkem and Drake, JJ., on the 7th and 9th August, 1895.

*Frank Higgins*, for the prisoner : The gist of the offence is the taking of the girl out of the possession of her father. *Reg. v. Bates*, 3 F. & F. 274. It is necessary that the prisoner should have known, or have had reason to believe, that the girl was in such possession at the time of the taking. *Reg. v. Hibbert*, 11 Cox C.C. 246. The girl is in the constructive possession of her father only so long as she has the intention of returning home, and the *onus* of proving that she had that intention is on the Crown. *Reg. v. Mycock*, 12 Cox C.C. 28. Supposing the girl to have abandoned her father's possession and the prisoner then to take her away, the case is not within the statute ; *per* Parke, B., *Reg. v. Mankletow Dears*. C.C.R. 159, p. 164, 22 L.J. M.C. 115. The refusal

of the girl to go home, although suggested by the prisoner, shewed that she had then deliberately forsaken her father's possession.

*A. G. Smith*, for the Crown: The anterior facts are immaterial. The whole question is, Did the prisoner abduct the girl in Victoria? It makes no difference that the girl went by her own free will from her father's house to another place where the prisoner took her away. *Reg. v. Kipps*, 4 Cox C.C. 167. The taking constitutes the offence. It is a single substantive act, as in larceny, and not divisible. The only question is, Where did it take place? Clearly in Victoria, as, if the girl had gone home after meeting the prisoner there, no offence would have been committed in either jurisdiction. At most, the abandonment of the girl of her father's home was conditional upon the prisoner's meeting her at Victoria and taking her away. *Reg. v. Mankletow*, *supra*. As to the operation of the letters: enticing away is a different offence to the present, see section 284 of Code. If the indictment had been for "enticing away," the Court would probably not have had jurisdiction, as the enticement operated in Washington.

DAVIE, C.J. (dissenting)—

This case comes before the Court of Appeal by way of a case stated, in pursuance of section 743 of the Code, upon a conviction under the Speedy Trials Act, whereby Robert Blythe was sentenced to five years' imprisonment in the penitentiary for having, on the 10th July, 1895, at the city of Victoria, unlawfully caused to be taken a certain unmarried girl, to wit, one Belle Rockwood, being under the age of sixteen years, out of the possession and against the will of her father, Eugene Rockwood, contrary to section 283 of the Code. The trial took place before me, sitting in the County Court Judge's Criminal Court, and, after conviction, thinking there might be some doubt whether the facts constituted an offence over which the Courts of British Columbia had jurisdiction, I offered to state this case, and, at the request of the prisoner, stated the same accordingly, respiting meanwhile the execution of the sentence.

The facts, as disclosed by the stated case and the evidence and correspondence returned therewith, shew that Belle Rockwood, who was fifteen years old on the 17th October last, resided with her parents at Port Hadlock, in the State of Washington. The prisoner, a married man, living with his wife and children at or near the same place, became acquainted with her there, and on the 4th March, 1895, when still at Port Hadlock, wrote her that he was obliged to leave at once, being accused of a "most horrible crime," but protesting his innocence. In the letter the prisoner offers to send for the girl if she will come to him. The prisoner then went to Victoria, where he continued correspondence with the young woman by letters of a seductive character, addressed to and received by her at her home, urging her to come to Victoria and join him. In one letter dated 22nd May, the prisoner asks the young woman if she will come over to him about the 1st July, provided he sends money to bring her over. He remarks in his letter that he expects her father and uncle would follow them all round the world and "fix me plenty if you come to me, but it must all be done very quietly, and under other names, you understand;" and in a postscript to another letter, dated 31st May, prisoner says: "I understand I am a free man now. That woman that I was married to has got what she wanted, and will, I hear, marry Mr. Larsen shortly." The girl replied, agreeing to come to the prisoner, saying in one of her letters: "If you wish me to come to you, I will do so; glad enough to leave this abominable place."

The prisoner in his letters makes promises of marriage, but, in one letter received by the girl before starting, he says that he cannot marry her before she is eighteen years old, as a marriage in British Columbia before that age would be unlawful. In his letters he mentions the route by which she is to come, counsels her to register under an assumed name, and to dress herself in a way to appear older than she is, and promises to meet her on arrival.

By her own inclination, as the young woman remarks in her evidence, and influenced by the letters the prisoner had

written her, she left her home on the 10th July, 1895, with the intention of joining the prisoner, who had sent her money to pay her fare to Victoria. She travelled from Port Hadlock to Port Townsend, a distance of seven miles, by steamer, and from there to Victoria, the same day, by the *City of Kingston*, which runs to and from Victoria daily. The prisoner met her on the arrival of the steamer at Victoria, and, as he walked from the steamer with the girl, he asked her to think seriously of her father, mother and sister; that it was not too late; the steamer returned that evening, and if she wanted to go back she was at perfect liberty to do so. The girl's reply was that she would rather stay with him, and he then took her to a restaurant, and afterwards to a house on Esquimalt Road, where he introduced her as his wife, and remained with her that night.

The discussion of the case before the Court of Appeal has removed any doubt which I entertained as to the propriety of the conviction.

Section 283 of the Code enacts that everyone is guilty of a misdemeanor and liable to five years' imprisonment who unlawfully takes, or causes to be taken, any unmarried girl, being under the age of sixteen years, out of the possession and against the will of her father or mother, or of any other person having the lawful care or charge of her. The corresponding clause of this section was 9 Geo. IV., cap. 31, sec. 20, under which it has been repeatedly held to afford no defence that the taking was with the girl's consent or even at her express request, for, as remarked by Maule, J., in *Reg. v. Kipps*, 4 Cox C.C. 168, "the law throws a protection about young persons of the sex and within the age specified by the statute. It has been determined by the Legislature that at that age young females are not able to protect themselves or give any binding consent to a matter of this description." Consequently the Canadian Code adds to the provisions of section 283 above quoted: "2. It is immaterial whether the girl is taken with her own consent or at her own suggestion or not."

The present case turns on two points: 1. Was the girl

taken out of the possession of her father by the prisoner?  
2. If so, where did that taking occur—in British Columbia or in the State of Washington?

That the girl was taken by the prisoner from her father's possession there can, I think, be no question. A manual taking is not required; it is sufficient if, by persuasion, the girl leave the possession; *Reg. v. Kipps*, 4 Cox C.C. 167; and there can be no doubt of the persuasion here, whether of the letters or what took place on the meeting at Victoria. But it is urged that the persuasion, which is a constituent portion of the offence, consisted of the letters, which were all received in the foreign jurisdiction, and hence, as a material portion of the offence took place abroad, that the young woman when she arrived in Victoria had already abandoned her father's possession, and that the prisoner was guilty of no offence which our law could reach in taking her from the steamer. In fact, it was not a taking at all. The girl was free, and out of her father's possession; went with the prisoner voluntarily, and, so far from any persuasion being then exercised by the prisoner, he distinctly bade her think of father, mother and home, and return by the steamer if she saw fit.

I am entirely unable to assent to this reasoning. The taking referred to by the statute is the actual taking. The blandishments and allurements which may have prepared the mind of the girl to willingly submit to or court the taking, although perhaps, as in this case, highly immoral, are not themselves punishable. Until some overt act on the part of the prisoner, there is a *locus penitentiae*, and he may recede from his intended crime. So the prisoner here, if instead of taking the girl to the restaurant, and then to her destruction, had insisted that she abandon the evil purpose to which he had been alluring her, and return to her friends; had he even kept away from the place of meeting, he would have committed no criminal offence, whether in Washington or here. The very reply of the girl that she would rather stay with the prisoner, to his highly suggestive intimation that she was at perfect liberty to return home by the same



steamer which brought her, shews that there were just the two alternatives in her mind—either to stay with the prisoner or return to her home. So, if the prisoner had not taken the girl from the steamer, she would have returned home, and there the matter would have ended.

In *Reg. v. Mycock*, 12 Cox C.C. 28, Willes, J., says: "The father has constructive possession of the girl so long as she has an intention of returning to him, and, as remarked in the case of *Reg. v. Mankletow*, Dearsly 159, presently referred to, that constructive possession is not severed by a renouncement of possession conditional upon the prisoner meeting her at a particular place and taking her away."

In *Reg. v. Mankletow* the girl, by appointment, met the prisoner at a place two miles distant from her father's home. That case is reported in three places, viz.: Dearsly's C.C., p. 159; 22 L.J.M.C. 115; and 6 Cox C.C., p. 143. It was decided by a bench of six Judges: Jervis, C.J.; Parke, B.; Alderson, B.; Wightman, B.; Cresswell and Coleridge, JJ.; was argued by eminent counsel for the prisoner, and is the only case I can find where similar questions to those arising here are exhaustively discussed. The other cases are trials at Assizes, where hurried *dicta* are given by the presiding Judge as governing the facts in the particular case in hand. Chief Justice Jervis in *Reg. v. Mankletow* says: "So long as the girl continues a member of her father's family, and is under his control, she is in his possession"; and Parke, B., as reported in Dearsly, remarks: "Supposing the girl to have abandoned her father's possession, and the prisoner then to take her away, it would not come within the statute. But suppose she conditionally abandoned the possession of her father under the impression that the prisoner would be at a certain point to take her away, that would not be a determination of her father's possession."

That seems to me precisely what occurred here. The girl conditionally abandoned the possession of her father under the impression that the prisoner would be at a cer-

tain point to take her away ; but, as remarked by Baron Parke : " That would not be a determination of the father's possession."

The *Law Journal* reports Jervis, C.J., as saying : " The facts of this case show that there was a continuing possession in the father. The girl, by the prisoner's persuasion, left her father's house for the particular purpose of meeting the prisoner ; if she had not met him, she would have returned home ; the possession of the father, therefore, was only conditionally renounced ; by the act of taking, the prisoner severed the connection between the girl and her father, and so took her out of his possession."

In Cox, C.C., Chief Justice Jervis is reported as saying : " The girl left her house by the prisoner's persuasion for the particular purpose of meeting the prisoner at an appointed place, and, until that purpose was accomplished, the control and possession of the father continued ; if she had not met the prisoner, she would have returned home, but he interferes and persuades her to go with him, and she does so, and he takes her bundle and puts it with his own in the box. By these acts all care and control on the part of the father is determined, and at that time the prisoner takes her out of the possession of her father." To the question, then, " When did the taking out of the father's possession occur ?" I answer : " At Victoria, when the prisoner met the girl at the boat and took her from there."

The fact of the prisoner, before taking her to the restaurant, reminding her of home and telling her that she was at perfect liberty to return there, was, it seems to me, a most effective way of alluring and persuading the girl to go with him, instead of going home, just as effective as if he had then repeated every word which he had written in his letters.

So that, casting out of consideration for the moment the letters and everything which had occurred previous to the girl's coming here, we have the fact that the prisoner knew that the girl had left her home that same day with the idea of meeting him ; with this knowledge he meets her at, and

takes her from, the boat, alluring her to accompany him eventually to the house on the Esquimalt Road. Begun, continued and ended in British Columbia, I cannot conceive what is wanted to complete his crime. The girl had come to a foreign jurisdiction; but what difference can that make? It is not suggested that the law relating to the custody of children is different, and, until it is shewn to be so, is presumed to be the same, *Mostyn v. Fabrigas*, Sm. L.C., 9th Ed., p. 684, and the father's possession would have been enforced here as well as there. It is no more an extraordinary thing for a young woman to take a trip to Port Townsend or Port Hadlock than it would be to Maple Bay or Salt Spring Island. You would take a steamer either way; the distance is about the same, and the time occupied on the trip about as long. You would not think that a young girl taking the latter trip had thereby necessarily abandoned her father's possession, although she had gone there to meet her lover and might possibly elope with him; and why should you so consider, because, instead of going to Salt Spring Island or Maple Bay, she goes to Port Townsend or Port Hadlock, or *vice versa*? The imaginary boundary line can make no difference.

. I grant that if the prisoner had known nothing of the girl's parentage, and if she had apparently been a waif and stray, he, as in *Reg. v. Primett*, 1 F. & F. 50, or *Reg. v. Green and Bates*, 3 F. & F. 274, could not have been considered as taking her out of her father's possession; but that is not the case here. He knew full well when he met her where she had come from on that very day. It is true that in *Reg. v. Olifer*, 10 Cox C.C. 404, Baron Bramwell, at *nisi prius*, expresses the opinion that "if a young woman leaves her father's house without any persuasion, inducement or blandishment held out to her by a man, so that she has fairly got away from home, and then goes to him, although it may be his moral duty to return her to her parents' custody, yet his not doing so is no infringement of the Act of Parliament, for the Act does not say he shall restore her, but only that he shall not take her away." But

this is a mere *obiter dictum*, unnecessary, for determination even, of the case then in hand. If the instance put by Baron Bramwell is intended to include the case where the man is or becomes aware of the parentage, I cannot reconcile it with the reasoning of Willes, J., in *Reg. v. Mycock*, 12 Cox C.C. 28, and of Cockburn, C.J., in *Ex parte Barford*, 8 Cox C.C. 405.

In the former case Willes, J., remarks that the prisoner had no more right to deprive the father of the girl, of his property as it were, in her, than he would have a right to go into his shop and carry away one of his telescopes or optical instruments. By the same reasoning, then, it seems to me a man, finding a girl under sixteen, and discovering her home and parentage, has no more right to deprive the father of the girl, of his property, as it were, in her, by keeping her, than would a man finding one of her father's telescopes or optical instruments in the streets, knowing it to be her father's, to keep it and appropriate it to his own use. He would be bound to return the telescope, and so, it seems to me, would be to restore the girl.

In *Ex parte Barford*: Howse and Hopkins were not in any way responsible for the girl's leaving her father's house, but they retained possession of her, knowing of her parentage; and Cockburn, C.J., remarks that if they had been indicted under 9 Geo. IV., cap. 31, sec. 20, no one could doubt that they would have been liable to be convicted of the offence.

That case also lays down the principle followed in *Re Agar-Ellis*, 10 Ch. D. 49, that a father, if there be no disqualifying cause, has a right to the custody of a female child up to the age of sixteen, although she be unwilling to live under his care and control. Chief Justice Cockburn gave the judgment of Hill and Blackburn, JJ., and himself, and stated that in coming to the conclusion which they did, they had consulted with the Judges of the other Courts, all of whom were unanimous in opinion with the Judges of that Court.

At most, then, what took place here was a conditional

abandonment of the parent's possession. If the prisoner was prepared to meet her and marry her, or whatever it may be, the girl was prepared to abandon her father's possession, not otherwise. Under these conditions, then, her father's possession continued until the purpose of her coming here was accomplished by the prisoner taking her away.

I am therefore of opinion that the prisoner's offence was wholly perpetrated in British Columbia by his there taking the girl, Belle Rockwood, out of her father's possession, and that the conviction should be affirmed.

CREASE, J. (dissenting)—

This appeal came before this Court under section 743 of the Criminal Code, upon a case stated by the Chief Justice, before whom the prisoner was tried under the Speedy Trials Act and sentenced to five years in the penitentiary, for having on the 10th July, 1895, at the city of Victoria, unlawfully caused to be taken a certain unmarried girl, to wit, one Belle Rockwood, being under the age of sixteen years, out of the possession and against the will of her father, Eugene Rockwood, contrary to section 283 of the Criminal Code.

The facts of the case are fairly, but somewhat briefly, told in the case stated, as submitted to the Court; but are more fully detailed in the opinion of the Chief Justice, which, as well as those of my brother Judges in our several conferences hereon, I have had the privilege of hearing.

Since then I have carefully examined all the authorities which have been brought forward in elucidation of the legal points with which the question submitted to us abounds, and have come definitely to the conclusion that :

(1.) The taking which constituted the abduction took place in Victoria, and was not complete until the prisoner—a married man—took the girl from the warehouse to the restaurant, and to the, to her, fatal house on the Esquimalt Road.

(2.) That her abandonment of her father up to that time was conditional, and she was, until the taking, constructively

in the possession of her father. And for the following reasons :—

As to (1) : Because the persuasion which was the motive power (her own consent and inclination by section 283 of the Code count for nothing), which, though it commenced in Washington State, was continued and freshly exerted here ; and, with the subsequent taking her out of such possession, constituted one complete offence, all of which occurred in British Columbia.

The prisoner's conversation with her, on coming from the steamer, was, as I read it, transparently made to protect himself—making evidence against a British Columbia law, into which he had evidently to some extent been inquiring, when he fixed for her the marriageable age without consent at eighteen, and must have done so with his own views and intentions in regard to her in his mind. If she had said, " Well, I'll go back," can anyone who read his letters doubt the persuasion he would then have used and the magnetic force of personal influence he would have exerted upon the young girl to carry out his purpose. If he was in earnest in what he said (she certainly thought he was) that would shew that there was still an alternative left to the girl in the contemplation of both, of returning to her father's house and home ; in other words, she was still constructively in her father's possession, not yet abandoned, and so she must necessarily have regarded it when she answered, " I would rather " (meaning of the two) " stay with you."

All that had taken place between them, up to the actual taking, without the taking, would have been no offence, and she would still have been constructively in the father's possession. It is to him that, if the prisoner refused to, or had not met her, she would naturally and necessarily have returned. The prisoner's words " that it was not (then) too late," if he meant them to have any weight at all, were very significant as to what extent matters had gone between them, and indicate that it was from that point that he took the young girl to her ruin.

I look upon the expression upon which the learned

counsel for the prisoner laid so much stress, "this abominable place," as the subsequent context of the letter shews, merely as the hasty, petulant utterance of a lovesick girl, whose lover had been obliged hastily to leave the neighbourhood and consequently herself, on being accused of a "most horrible crime," of which she of course thought him innocent. The same remark applies to her other extravagant utterances against individual members of her family, as temporary ebullitions of feeling on his account, not proofs of a settled intention of total abandonment.

Had he not met her, or had he repented, or refused to carry out his engagement, it is but natural to infer that a total revulsion of feeling in their favour would have set in, and that "total abandonment" could not have been determined upon by her until the final interview at Victoria settled her fate. Her father by his own conduct shewed that he did not consider his possession and control severed, which, under *Reg. v. Kipps*, 4 Cox C.C. 168, the law gives to parents for the protection of females under sixteen, and that is an important element in the case.

It must be remembered, too, throughout that the presumption, until rebutted, is that the same law giving control to parents over their children is, under *Mostyn v. Fabrigas*, Sm. Ldg. Cas. 9th Ed. 684, extant in Washington State as in British Columbia.

I entirely concur in the Chief Justice's reasoning, and the construction he puts on the case of *Reg. v. Mankletow*, as reported in Dearsly's C.C. p. 159, 22 L.J.M.C. 115, and 6 Cox C.C. p. 143—and the conclusions of the Judges in that case appear to me to apply exactly to the circumstances of this case. "Supposing (Baron Parke observes) the girl to have abandoned her father's possession, and the prisoner then to take her away, it would not come within the statute. But suppose she conditionally abandoned the possession of her father under the impression that the prisoner would be at a certain point to take her away, that would not be a determination of her father's possession." And so here, if the prisoner had not met her, or refused to carry out the

pre-conceived purpose, she must have returned home. The letters shew her disinclination (besides being in a foreign place) to enter service; her infatuation for the prisoner precluded the alternative of another lover, and the only and easy alternative was to return to a home only a day distant from Victoria.

It has been suggested that the mere distance come is a proof of abandonment; but that, I think, has no more to do with it than going a day's journey in any other direction, whether in Washington or across the line.

The father's possession remains still. Her answer to prisoner's suggestion that she had still the opportunity of returning home, just like the solemn protest of one of his letters, that he "could not wrong her"—so vilely falsified by the event—acted on her, as he intended it should, as if he were making a chivalrous and supreme effort of self-denial for her sake, which would have the effect, on a young girl's heart, of the strongest possible persuasion, and that within British Columbia, which induced her to choose finally to renounce the conditional possession and control of the father, which existed up to that moment, and go with the prisoner to her ruin. The words "I would rather stay with you," express just as clearly as if they had been spoken the additional words, "than accept the other alternative and go home."

Leaving the letters out of the question, we have then the knowledge of the prisoner, in British Columbia, that she had that morning left home to come and meet him. She had only conditionally renounced the possession of her father. If she had not met him, or he had refused to take her, she would have returned home. The prisoner's act in taking her to the restaurant and the Esquimalt house severed her from her father finally, and constituted the taking her out of the possession, to which, under *Reg. v. Mycock*, 12 Cox C.C. 28, and *Ex parte Barford*, 8 Cox C.C. 405, he was bound, with such full knowledge, to have returned her.

The law respecting the custody of children must be taken



to be the same in Washington State, whence she came, as here in British Columbia, until the contrary be proved, and that the father's possession would be enforced here as well as across the boundary line. *Mostyn v. Fabrigas*, Sm. L.C. 684. There is no suggestion to the contrary ; and the father did come and resume possession of her here, and this does not appear to have been opposed.

We have thus all the elements of the complete offence occurring within British Columbia. The knowledge of the prisoner, in the first place, of the father's possession of the girl ; of, at the most, the conditional abandonment of that possession by the girl ; the persuasion by the prisoner as the motive force, exerted here, and the taking her out of the possession of and against the will of her father. So that the prisoner's crime fulfils all the conditions of section 283 of the Code within British Columbia, and is complete, and the conviction should be confirmed.

MCCREIGHT, J.—

Having regard to the remarks made by the Judges in *Reg. v. Mankletow*, 6 Cox C.C. at p. 146, and see the same case in 22 L.J.M.C. at p. 117 ; *Reg. v. Mycock*, 12 Cox C.C. p. 28, it appears essential to the case being within the Act that the girl should be "in the possession of her father, or other person having the lawful control of her" at the time of the unlawful taking, and, sitting as a juryman (and a Judge sitting in appeal like this has to discharge the functions of a juryman as well as a Judge), it becomes incumbent on a Judge to determine whether the girl was in the possession of her father on her arrival in Victoria, so as to be taken out of that possession by the prisoner in that place ; and a Judge must find that such possession of the father continued in Victoria up till the time of taking ; and the Judge must be satisfied on this point beyond all reasonable doubt. I must say that, far from being satisfied as to such possession beyond a reasonable doubt, I should find it reasonable to conclude that the girl had abandoned such possession before leaving Port Townsend for a foreign

country. From this point of view alone, I think the conviction cannot be sustained.

But there is a further point of view from which I think the conviction cannot stand. In *Regina v. Olifier*, 10 Cox C.C. 402, Baron Bramwell points out that in that case the persuasion of the prisoner constituted the motive cause of the girl leaving her home. The letters which passed between the girl and the prisoner, and which, of course, only operated in Washington, leave no doubt in my mind that they were the main and the motive cause of her leaving, and, if so, some material factors in this case took place out of the jurisdiction of this Court, and the difficulty is analogous to what used to take place at common law before remedied by statute, where a man received a fatal blow in a foreign country and died in England.

I have only to add that I am quite unable to say, as a jurymen, that the evidence in this case warranted the conviction.

WALKER, J.—

The conviction in this case could have been supported if the persuasion used by the prisoner to induce the girl to leave her father's roof had taken place within the jurisdiction; that is to say, after the girl had arrived here. In *Reg. v. Olifier*, 10 Cox C.C. 402, Baron Bramwell thus lays down the law, not as an *obiter dictum*, as has been just stated to have been the case by the Chief Justice, but for the guidance of the jury: "I am of opinion that if a young woman leaves her father's house without any persuasion, inducement or blandishment held out to her by a man, so that she has got fairly away from home, and then goes to him, although it may be his moral duty to return her to her parents' custody, yet his not doing so is no infringement of the Act of Parliament, for the Act does not say that he shall restore her, but only that he shall not take her away. It is, however, equally clear that if the girl, acting under his persuasion, leaves her father's house, although he is not present at the moment, yet if he avails himself of that leaving which

took place at his persuasion that would be taking her out of her father's possession, because the persuasion would be the motive cause of her leaving." In *Reg. v. Booth*, 12 Cox C.C. 232, the question of persuasion was the first one left to the jury, not as an incidental question, but as part of the issue. "The real issue for you to try," said the learned Judge, "is simply this: Was she taken out of the possession and keeping of her father without her father's consent? Did the prisoner take her away?" Both of these authorities illustrate the importance attached to persuasion. In both, it is dealt with as a necessary element or factor in cases of abduction, for, according to Baron Bramwell, where there is no persuasion there is no infringement of the statute.

In the present instance, persuasion was used by the prisoner in his letters to the girl to induce her to leave home; but the letters were received by her and influenced her at Port Hadlock; hence the act of persuasion took effect beyond this jurisdiction. We have, therefore, no more authority to take cognizance of this stage of the prisoner's alleged offence than we would have had to entertain jurisdiction over the complete offence had it been committed in the State of Washington. Consequently, the letters, so far as they held out the inducement mentioned, should not have been admitted at the trial as evidence against the prisoner. The arrangement (call it conditional, if you will, to meet Baron Parke's observation in *Reg. v. Mankletow*), which was made through the medium of the same letters, to the effect that the prisoner would meet the girl when she landed here, is open to the same fatal objection, as it was one of the inducements referred to, and therefore, one of the acts which formed part of the offence complained of; for every act—need I say?—which serves in the whole or part to constitute an offence under our criminal law must occur or be committed within the territorial limits over which that law extends, or, in other words, within the Dominion, otherwise we have no authority whatever to adjudicate upon it. Again, I am unable to hold with that degree of certainty which the criminal law holds to be indis-

pensable that the girl was constructively in her father's possession after she left his house, or, at any rate, after she had landed here; and if she was not, and even if it were doubtful that she was, the prisoner is entitled to his discharge.

In addition to this, the prisoner so far from persuading the girl after she arrived here to leave her parents dissuaded her from doing so, as appears by the following notes taken of her cross-examination: "You" (the prisoner) "met me at the warehouse," meaning the *City of Kingston's* wharf in Victoria. "I do not remember the exact conversation as we came from the steamer." Prisoner—"Did I not ask you to think seriously of father, mother and sister, it was not too late, the steamer returned that evening, and if you wanted to go back you were at perfect liberty to do so?" "Yes." Was not your answer—"No, Robert, I would rather stay with you?" "Yes." It may be said that the prisoner acted very artfully in putting such questions and giving such advice, and that he expected no other answer than he got; but that matters not, so long as the girl thought that he was in earnest in what he said, and there is no evidence that she did not.

Coupling the girl's avowed refusal to return home with her statement in her letters to the prisoner that she was glad at the prospect of leaving it, as it was to her an "abominable place," and that the only person she regretted leaving was her aunt; also with the fact that she made deliberate preparations to depart with the intention of marrying the prisoner and then crossed the straits into a foreign jurisdiction, it seems to me only reasonable to conclude that from the moment she left her father's roof she meant to renounce his protection; and that being so, his constructive possession of her would be gone. *Reg. v. Mycock*, 12 Cox C.C. 28. It would have been quite a different thing if, for instance, she had come here on a visit to friends with her parents' consent, for, in such a case she would be constructively in her father's possession, as a visit would of itself imply an intention to return; but the facts before us are opposed to the inference that she

had any such intention, and hence, according to the decision last cited, she was not in her father's possession, at any rate, when the prisoner met her.

Again, as the prisoner, after the meeting, used no persuasion to induce her to abandon her home, his subsequent taking her away, though strongly to be condemned, is not an offence within the meaning of the section of the Criminal Code under which he has been convicted.

For this and the foregoing reasons, the conviction should be quashed.

DRAKE, J.—

In my opinion this conviction must be quashed. The offence aimed at in the Code is taking a girl under the age of sixteen out of the possession of and against the will of her father. In order to give this Court jurisdiction the possession of the father must be within the territorial limits of Canada. If the prisoner had gone over to Port Hadlock and personally assisted the girl in the elopement, the offence would be complete in the State of Washington and the laws of the United States would apply and not our Code. Instead of personally assisting, the prisoner arranged the elopement by correspondence, and supplied the necessary funds. In my opinion the result is the same, the persuasion equally took place in a foreign country. The prosecution endeavored, therefore, to shew that the abduction—that is, the taking the girl out of the possession of her father—was effected when the prisoner met her on the wharf at Victoria. This is not so, for if, instead of the prisoner, some charitably disposed person had met her and taken her in charge it could not be said he abducted her, although her arrival here was against the will of her father. There must be some active step within the jurisdiction, to unlawfully get possession of the girl against the will of her father. But it might be urged the prisoner is guilty because her arrival here was induced by him; but, in order to convict, the inducement must have been offered here. Of that there is no evidence; in fact, the evidence shews that the prisoner pointed out to her that

she could leave if she wished. The girl, when she arrived here was *de facto* out of the possession of her father. The statute contemplates a *de facto* possession. If she left her father's house on a visit with his consent, this would be consistent with actual possession if the father was within the jurisdiction. But, if she left without his consent and went to a foreign country, she is the person who has severed the connection between her father and herself. And, although by following her to the place of retreat he may be able to establish a possession *de jure*, that is not the possession contemplated by the Act.

I consider the conduct of the prisoner scandalous in the extreme ; but however bad and unnatural he has shewn himself to be, he has not brought himself within section 283. All the authorities cited deal with cases where the parties were within the jurisdiction from the first inducement to the ultimate removal.

In *Reg. v. Mondelet*, 21 L.C. Jur. 154, the authorities which were cited and fully discussed in the argument were all reviewed, and it was there held that if a girl had left home voluntarily and then met the prisoner it would not be a case within the statute ; and for the purposes of this case it must be held that only the acts that took place on Canadian soil can be looked at. In *Reg. v. Henkers*, 16 Cox C.C. 258, where a girl employed as a barmaid with her father's consent, was taken away by the prisoner, it was held he could not be convicted of taking her out of the custody of her father, and in *Reg. v. Miller*, 13 Cox C.C. 179, when a girl went to visit her parents from Sunday to Monday, but by arrangement with the prisoner left her parents' house on Sunday and went with him, it was held she was not in her father's possession at the time of the alleged offence, but of her master.

These cases clearly shew that there must be an actual possession in the father at the time of the taking, which, as I have pointed out, was a taking on arrival of the boat in Victoria, and I see no evidence of it here.

*Prisoner discharged.*

**Notes : Abduction—Evidence of persuasion.**

It will be observed that, although in his dissenting judgment upon the reserved case *Davie, C.J.*, expresses his opinion that the fact of the prisoner reminding the girl of home, and telling her that she was at perfect liberty to return there, was "a most effective way of alluring and persuading the girl to go with him, instead of going home, just as effective as if he had then repeated every word which he had written in his letters," there is no express finding of fact to that effect embodied in the reserved case. It can hardly be doubted that it would have been competent for a jury to have drawn that inference, and the learned Chief Justice, trying the case by consent without a jury, was clothed with the authority of a jury in that respect. Had such a finding been included in the case, could the appellate tribunal have overturned it if there were evidence to warrant the finding, although the appellate court would not itself have drawn the same inference?

So far as the question of "persuasion" involves the question of "intent," evidence is admissible of acts done in a foreign jurisdiction as shewing the intent, which is a mental quality not dependent on jurisdiction. *Jackson v. Commonwealth*, 1897, 38 S. W. Rep. 1091.

***Locality of crime—Extra-territorial act.***

All crime is local, and the jurisdiction over the crime belongs to the country where the crime is committed. *Jefferys v. Boosey*, 1855, 4 H.L.C. 815, 24 L.J. Ex. 81, per Parke, B.; *Macleod v. New South Wales*, 1891, A.C. 455, 17 Cox C.C. 341.

But if a material part of any crime is committed within the jurisdiction, legislation may properly provide for the punishment there of the whole of it. Bishop on Cr. Law, sec. 116.

And offences committed by a subject or citizen within the territorial limits of a foreign State may, by legislation, be made punishable in the courts of the country to which the party owes allegiance, and whose laws he is bound to obey.

**Notes : (Continued).**

Wheaton's International Law, sec. 113, re *Bigamy Sections* of Code, *ante*, 172.

Where a female, living in Missouri with her father, went into Iowa to visit her uncle, and, in pursuance of an arrangement with her, made before she left Missouri, the defendant went to her uncle there and obtained possession of her, on pretence that her mother was dangerously ill and her father had sent him for her ; and the two then left together and lived in sexual intercourse as well in Missouri as in Iowa, from which State they at once removed, it was held that the father had the care and custody of the daughter while she was in Iowa at her uncle's in the same way as if she had been on a visit to a neighbor in the same country, and that an offence was proved to have been committed in Missouri against a statute of that State forbidding the taking away, for the purpose of prostitution or concubinage, of any female under the age of eighteen years, "from her father, mother, guardian or other person having the legal charge of her person." *State v. Round* (Mo. Sup. Ct.) 6 Cr. Law Mag. 356.

In cases of obtaining goods under false pretences, the crime is complete where the goods are obtained ; and, therefore, if the pretences are made within one jurisdiction and the property is obtained in another, the person making the representations must be indicted within the latter jurisdiction. 7 Am. & Eng. Ency. of Law 758 ; *People v. Sully*, 5 Parker Cr. Cas. (N.Y.) 142 ; *Skiff v. People*, 2 Parker Cr. Cas. N.Y. 139 ; *Connor v. State*, 29 Fla. 455, 30 Am. St. Rep. 126.

On an indictment for obtaining money by false pretences by sending a false return of fees to certain public commissioners, it was shewn that the return was received in Westminster with a letter dated Northampton, together with an affidavit sworn there, and that the Commissioners thereupon issued an order upon the Treasury to pay certain moneys to the prisoner. It was held by Coleridge, J., that the jury might infer that the documents were posted in Northamptonshire, where the affidavit was sworn, and from



**Notes : (Continued).**

which county the letter purported to have been written, and that the prisoner was properly indicted in Northamptonshire for obtaining money by false pretences, the "forwarding" of the false return, etc., being alleged as the false pretence. *R. v. Cooke*, 1858, 1 Foster & F. 64.

The last-mentioned case was followed and approved by the Court for Crown Cases Reserved in *R. v. Holmes*, 1883, 15 Cox C.C. 343. It was there held that where a false pretence was made by the prisoner in England by letter there posted to a person in France, and received in France by the latter, in consequence of which the latter sent to the prisoner a cheque drawn in France but payable in England, which the prisoner cashed in England, an offence was established to have taken place in England, and that the prisoner was properly indicted and convicted there. Lord Coleridge, C.J., said : "The pretence was made in the County of Nottingham, for it was held in *R. v. Burdett*, 4 B. & Ald. 95, and other cases, that the delivery at the post office of a sealed letter, enclosing a libel, is a publication of the libel at the place of posting, and the money, which was the result of the false pretence, was obtained in Nottingham ; therefore, the two necessary ingredients of the offence both took place in the country where the prisoner was tried."

***Against the will of parent—Conduct as proof of consent.***

If the jury believe that the mother has countenanced the daughter in a lax course of life, by permitting her to go out at night and to dance at public houses, the case is not within the intent of the statute, but is one where what had occurred, though unknown to her, could not be said to have happened against her will. *R. v. Primelt*, 1858, 1 Foster & F. 50, per Cockburn, C.J.

It may be doubted whether it would be an offence to take away a girl against the consent of her parent, but by the consent of one who has the temporary care of her. Archbold's Cr. Evidence, 1893, 21st Ed. 805.

**Notes :** (*Continued*).

*Putative father*—"Person having lawful care or charge."

To take a natural daughter under sixteen years of age away from the custody of her putative father is an offence under the section of the Cr. Code quoted in the principal case. *R. v. Cornfield*, 2 Str. 1162; *R. v. Sweeting*, 1 East P.C. 457.

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[HIGH COURT OF JUSTICE, ONTARIO.]

BEFORE ROSE, J. AND MACMAHON, J., SITTING AS A  
COURT FOR CROWN CASES RESERVED.

**THE QUEEN v. WETTMAN.**

*Gaming house—Offence of keeping—Locality of crime—Acts partly in foreign jurisdiction—Cr. Code 196, 198.*

1. Without special statutory provision to that effect the mere use of a gaming instrument in Canada for deciding by chance the winning of stakes placed in a foreign country and payable there, is not gaming so as to make the party operating such instrument liable as the keeper of a common gaming house.

ARGUED : May 30th, 1894.

DECIDED : June 23rd, 1894.

This was a case reserved by the chairman of the General Sessions of the Peace for the county of Welland.

The reserved case as amended was as follows :

The defendant was indicted under section 198 of the Criminal Code, 1892, for keeping on the 18th day of November, A. D. 1893, at Fort Erie, in the county of Welland, a disorderly house, to wit a common gaming house, as defined by sub-sections (b), (ii) of section 196, and was convicted at the December Sessions, 1893.

A second count charged him with keeping said house on the 20th, and a third count on the 22nd day of said month.

The evidence adduced by the Crown and relied on to sustain the conviction showed :

1. That the defendant was, under sub-section 2, of section 198, the person appearing to have the care, government or management of the house.

2. That the game which the defendant was charged with carrying on was the game of "policy," the implements used being a wheel, a quantity of numbers on printed slips from one to seventy-eight, both inclusive, and a board with the same numbers painted thereon.

3. That the manner of playing the game, as carried on by the defendant, was as follows :

A number of agencies were scattered through Buffalo, in New York State, where persons desirous of playing the game went, and there made a selection of numbers (usually of three) between the numbers one and seventy-eight. Having chosen his numbers, the player put them down on two slips, one of which he gave to the agent, the other he retained, and at the same time he paid whatever sum (it was shown that five or ten cents was the ordinary amount staked) he desired to stake on the game. The agent delivered these slips and the money so staked to the head office of the defendant (also in Buffalo). In Fort Erie, in the county of Welland, the other part of the game, viz., determining the winning or losing numbers was carried on, and the operation was as follows :

The operator went to the room where the wheel before referred to was kept, each day at twelve and five o'clock.

He had the individual numbers from one to seventy-eight, before mentioned, in small individual boxes—one in each box. These he opened to show any one present that there was one number in each box. Having done this, he deposited all the boxes in the wheel before mentioned, which was a hollow wheel resembling a cheese box with glass sides.

He then revolved the wheel so as to effectually shuffle the boxes. He then opened the wheel, and out of the seventy-eight boxes, withdrew twelve, opened them singly and called out the numbers contained therein. He then returned the numbers to the boxes, closed the boxes,

deposited them in the wheel, and went through the same operation of revolving the wheel, shuffling the boxes and withdrawing twelve, the numbers in which he also read out. Having done this, he telegraphed these numbers, which were the winning numbers, over to the head office in Buffalo where printed slips were issued and delivered to the different agencies. If a player had chosen three numbers which appeared on these slips, he had won and got two dollars for each cent he had so staked. He must have chosen all three to win. And the odds were in favor of the banker or other person by whom the game is managed.

4. The only thing done in this country was the revolving of the wheel and the determining of the winning numbers. The money was staked, and if won, paid in Buffalo.

5. The instruments used in the game were instruments of gaming, as shown in section 702.

6. It was also proved in evidence :

1. That on the 23rd day of November, 1893, the house where the implements aforesaid were kept and used was entered under section 702 of the Criminal Code, 1892, by the constable (who made the arrest of the defendant) under a search warrant properly issued under the Criminal Code ; that the defendant was there in the same room where the implements aforesaid were, and that these implements were seized at that time by the constable and retained in his custody and produced by him at the trial.

2. No evidence was given on behalf of the defendant that there was no gaming going on in the house to meet the *prima facie* case established under section 702.

At the request of the defendant's counsel and under the authority of the Criminal Code, the following question arising upon the evidence was reserved by me for the opinion of the Justices of the Common Pleas Division of the High Court of Justice.

Was the defendant properly convicted of the offence charged upon the foregoing statement of facts ?

*Osler*, Q.C., for the defendant.

*Cartwright*, Q.C., for the Crown.

The arguments and cases referred to sufficiently appear in the judgment.

TORONTO, June 23rd, 1894.

ROSE, J.—

The statute is aimed at gaming. The object is to save the unwary from hurtful temptation; to protect the residents of this Dominion from the injury which results not only to them, but to society at large from the waste of their substance in gaming. It is not to be supposed that the legislation is for the protection of the residents in a foreign State. Such persons make laws for themselves.

The facts here show that the betting or gaming in this case took place not in Canada but in Buffalo. The persons betting, the money paid and received, the tickets obtained, all these were in Buffalo. The happening of the chance upon which the money was risked took place in Canada, but nothing more. The players under the statute mean the persons playing the game in which the chances happened.

I do not see how on any fair construction of the language of the statute, it can be said that the defendant was keeping "a house, room, or place, kept or used for playing therein any game of chance, or any mixed game of chance or skill, in which any game is played, the chances of which are not alike favorable to all the players, including among the players, the banker or other person by whom the game is managed, or against whom the game is managed, or against whom the other players stake, play, or bet."

A reference to the Imperial statute from which this section was drawn, viz., 8 & 9 Vic. ch. 109, sec. 2, and the preamble to the Act, will make it plain that such a case as the one before us was never contemplated by the framers of the provision, and was not provided against.

The plain duty of the Court is to construe existing legislation according to its true meaning as far as it is made to appear, and not to add by judicial legislation new provisions to an Act of Parliament to cover cases not thought of, and therefore not intended to be covered when the Act was passed,

There must be judgment for the defendant declaring that he was not properly convicted of the offence charged, viz., keeping a disorderly house, to wit, a common gaming house as defined by sub-sections (b), (ii) of sec. 196 of the Criminal Code.

MACMAHON, J.—

By section 196 of the Code 55 & 56 Vic. ch. 29 (D): "A common gaming house is :—

"(b) A house, room or place kept or used for playing therein at any game of chance, or any mixed game of chance and skill, in which—

\* \* \* \* \*

"(ii) In which any game is played, the chances of which are not alike favorable to all the players, including among the players the banker or other person by whom the game is managed, or against whom the game is managed, or against whom the other players stake, play or bet."

The case reserved, states that the defendant was, under sub-section 2 of section 198, the person appearing to have the management of the house. And the case also gives the effect of the evidence adduced by the Crown, describing the instruments made use of in carrying on the game of "policy," as it is called, as well as the *modus operandi* in conducting the game.

This was the use of a gaming instrument in this country, for deciding who were the winners of moneys staked, and if won, paid in a foreign country. This is not gaming here. In order to constitute gaming, there must be a stake of some kind. There being no stake in this country, there could be no violation of the law against gaming here.

In *Jenks v. Turpin*, 13 Q.B.D. 505, Mr. Justice Hawkins, in his judgment, refers to all the Imperial enactments respecting gaming and gaming-houses, as well as citing from text writers on criminal law, dealing with the question. And in addition, numerous decisions on the law relating to gaming are referred to. The judgment, therefore, contains in a small compass a mine of information on the subject.

It is not necessary I should draw from this, except when referring to section 702 of the Code, which I now do.

It was urged by Mr. Cartwright, that no effect is given to section 702 if the instruments of gaming found in the house, which the case states was in the care and management of the defendant, is not sufficient to convict him of keeping a common gaming-house. But the answer to that is, that under section 702, the instruments found must be "instruments of gaming used in playing any unlawful game," and the case reserved shows that where the instruments were used there were no stakes placed here on the result, and if no stakes, there was no gaming; and if no gaming, then there could be no common gaming-house.

Section 702, although not following section 2 of 8 & 9 Vic. ch. 109, is framed from it, and in *Jenks v. Turpin*, 13 Q.B.D., at p. 522, Hawkins, J., gives the section in full, and by it it is provided that: "in default of other evidence proving any house or place to be a common gaming-house, \* \* it shall be sufficient in support of the allegation in any indictment or information that any house or place is a common gaming-house, to prove that such house or place is kept or used for playing therein at any unlawful game, and that a bank is kept there by one or more of the players exclusively of the others, or that the chances of any game played therein are not alike favorable to all the players, including among the players the banker or other person by whom the game is managed, or against whom the players stake, play, or bet; and every such house or place shall be deemed a common gaming-house, such as is contrary to law and forbidden to be kept by 33 Henry VIII."

This shows that in the absence or default of other evidence proving the house or place to be a common gaming-house, evidence showing that unlawful games are played, that there is a bank, and that the chances are not alike favorable to all the players, etc., will be sufficient to convict of keeping a common gaming-house. So under section 702, in the absence of other evidence, proof that an instrument found in the house "used in playing any unlawful game," etc., "shall be

*prima facie* evidence on the trial of a prosecution, under section 198, that such house \* \* is used as a common gaming-house." But as already pointed out, there was not only no evidence that the instruments were used for unlawful gaming, but the case reserved shows there was no gaming carried on in the house—there being no stakes put up.

The statute does not reach such a case as we are now considering, and there must therefore be judgment for the defendant quashing the conviction.

*Judgment for defendant.*

**Notes :** *Gaming and gaming houses at common law.*

All common gaming houses are nuisances in the eyes of the law ; not only because they are great temptations to idleness, but also because they are apt to draw together great numbers of disorderly persons, which cannot but be very inconvenient to the neighborhood. Hawkins' Pleas of the Crown, book 1, c. 75, s. 6.

The principle upon which common gaming houses are punishable as nuisances is that they are detrimental to the public, as they promote cheating and other corrupt practices ; and incite to idleness and avaricious ways of gaining property, great numbers whose time might otherwise be employed for the good of the community. *Jenks v. Turpin*, 1884, 13 Q.B.D., 505, 514 ; Russell on Crimes, 1896, 6th Ed. 1., 741.

It makes no difference that the use of the house and the gaming therein was limited to the subscribers and members of a club, and that it was not open to *all* persons who might be desirous of using the same ; a *common* gaming-house is that which is forbidden—that is, a house in which a large number of persons are invited habitually to congregate for the purpose of gaming. Per Hawkins, J., in *Jenks v. Turpin*, 1884, 13 Q.B.D., 505, 516.

At common law the playing at any game was legal and permissible ; 11 Co. Rep. 87 ; and reference is to be had to the statutes alone to see what games are rendered unlawful. *Jenks v. Turpin*, *supra*.



**Notes : (Continued).***Imperial Statute from which Cr. Code 196 derived.*

The Imperial Statute, 1845, 8 & 9 Vic., c. 109, s. 2, referred to in the judgment and from which this section of the Code is drawn is as follows :

"2. And whereas doubts have arisen whether certain houses, alleged or reputed to be opened for the use of the subscribers only, or not open to all persons desirous of using the same, are to be deemed common gaming-houses; be it declared and enacted, that in default of other evidence proving any house or place to be a common gaming-house, it shall be sufficient in support of the allegation in any indictment or information that any house or place is a common gaming-house, to prove that such house or place is kept or used for playing therein at any unlawful game, and that a bank is kept there by one or more of the players exclusively of the others, or that the chances of any game played therein are not alike favorable to all the players, including among the players the banker or other person by whom the game is managed, or against whom the players stake, play or bet; and every such house or place shall be deemed a common gaming house, such as is contrary to law and forbidden to be kept by the said Act of King Henry the Eighth [33 H. 8 c. 9], and by all other Acts containing any provision against unlawful games or gaming-houses."

*Locality of Crime—Extra-territorial acts.*

See note, p. 284, *supra*.

## [SUPREME COURT OF BRITISH COLUMBIA.]

BEFORE McCOLL, J.

## THE QUEEN v. LAWRENCE.

*Speedy trial—Right to elect for—Bail—Effect of—Waiver by plea in jury court—Cr. Code 596, 601, 765.*

1. The admission to bail under Cr. Code, sec. 601, does not deprive the accused of the right to a speedy trial under Cr. Code, sec. 765.
2. The words "committed to gaol for trial" used in Cr. Code, sec. 765, should be construed as including any case where the accused is found in custody charged with an offence in respect of which he has the right to elect in favor of a speedy trial, and although he is so in custody by reason of his surrender for the purpose of appearing before the judge to elect a speedy trial after having been admitted to bail.
3. If the accused, after electing in favor of a speedy trial, his right to which is disputed by the Crown, takes no further steps to obtain that right and is then indicted at the next court of Oyer and Terminer, his plea to such indictment will conclude him as to the mode of trial, and he cannot afterwards elect for a speedy trial without a jury under Cr. Code, sec. 765.
4. Consent given in such case by the Crown to the withdrawal of plea to the indictment, upon a statement by the counsel for the accused that the plea was made inadvertently.

DECIDED : November 30, 1896.

The accused was brought before the Police Magistrate for Victoria for preliminary examination upon an information for obtaining money and valuable securities by false pretences. After hearing the evidence the magistrate declined to commit him for trial under section 596 of the Code, but admitted him to bail under section 601 under a recognizance by himself and two sureties, conditioned as therein provided, namely, "If, therefore, the said L. appears at the next Court of Oyer and Terminer (or general gaol delivery, or Court of General or Quarter Sessions of the Peace), to be holden in and for the County of Victoria, and there surrenders himself into the custody of the keeper of the common gaol (or lock-up house) there, and pleads to such indictment as may be found against him by the grand jury, for and in respect to the charge aforesaid, and takes his trial upon the same, and does not

depart the said Court without leave, then the said recognizance to be void, otherwise to stand in full force and virtue."

The accused having, before the sitting of the Court of Oyer and Terminer, intimated a desire to elect to be tried speedily, his right so to elect and the jurisdiction of a judge to try him speedily under section 765 of the Code was questioned by the Crown, and no further step in that direction was taken by the accused. An indictment for the charge was laid before the grand jury for the next sitting of the Court of Oyer and Terminer, who found a true bill. The accused was surrendered by his bail to the keeper of the common gaol, and was arraigned before the said Court, *coram* McCOLL, J., whereupon he pleaded not guilty to the indictment, and his trial was fixed for another day. Upon that day he appeared by counsel and desired to elect to take a speedy trial before a Judge, under section 765. Upon objection by counsel for the Crown, it was held by McCOLL, J., that the accused having pleaded to the indictment was concluded as to the mode of trial. Counsel for the Crown afterwards consented to the withdrawal by the accused of his plea to the indictment, upon a statement by his counsel that the plea was pleaded inadvertently. The plea being withdrawn the question of the right of the accused to a speedy trial was directed to be argued.

*Robert Cassidy and J. Stuart Yates*, for the Crown : The speedy trials jurisdiction is strictly limited to cases within the terms of the enabling section 765. Was the accused "a person committed for trial on a charge"? He was not. The magistrate refused to commit him. He was bound over under section 601 to appear and surrender himself upon a contingency which might never happen, namely, his indictment, and the finding of a true bill by the grand jury at the next Court of Oyer and Terminer. In the interval there was no charge against him upon which he could elect to be tried, or could be tried. When the indictment was preferred and a true bill found, it constituted the only charge against the accused to the same extent as if his preliminary examination before the magistrate had never taken place. Section 765

cannot be said *ex vi termini*, or by any inference, to extend to such a case, see note to the section at page 676 of Crankshaw's Criminal Code. The only obligation of the accused, after the preliminary examination, was that contained in the recognizance, the condition of which has been performed by his surrender and plea to the indictment. The Court, under the commission of Oyer and Terminer, has the duty imposed upon it of hearing, with a jury, and determining the charge contained in the indictment, which must be disposed of in some way, and which cannot be quashed, unless for inherent defect, except on motion of the Crown. If it is quashed, nothing upon which to try the prisoner remains, for it is not competent to the Crown now to initiate and prefer a charge against the accused under the procedure of the Speedy Trials Act. If the indictment is quashed, there is no process upon which the accused could be detained to answer such a charge, and it is clear that his consent would not give jurisdiction.

*H. D. Helmcken, Q. C., and S. Perry Mills*, for the accused: It is not the intention of the Act that a person accused of an indictable offence, whom the magistrate after a preliminary examination has released on bail to answer the charge at the next Court of Oyer and Terminer under section 601, should be deprived of the right to elect to take a speedy trial by the circumstance that the evidence against him was not sufficiently strong to warrant his committal to prison to answer the same charge. The effect of a committal under section 596 is a holding to answer to the charge in the same tenor as the recognizance here, at the next Court of Oyer and Terminer, etc., unless the accused elects to be speedily tried under section 675, for neither the recognizance of bail under section 601 nor the commitment under section 596 contain any words relating to the right to elect, the words of the commitment being to "keep until he shall be thence delivered in due course of law." In each case the effect of the detention and obligation is to be tried at the next sittings of Oyer and Terminer, subject to the unexpressed right of the accused to elect to be tried speedily. An accused person

bound over by recognizance to answer to the charge, if and when laid before the grand jury, is as much committed for trial upon it as if he had been sent to gaol to be there held upon the same exigency. The bond is substituted for the imprisonment. In either case an indictment may possibly not be laid. That is a matter for the Crown. The recognizance is not discharged, as the accused, having withdrawn his plea, has not pleaded to the indictment, and the Court can quash the present indictment and allow the prisoner now to elect to be tried upon a charge to be preferred under the Speedy Trials Act.

VICTORIA, B.C., November 30th, 1896.

McCOLL, J.—

The accused, having been charged before the Police Magistrate of the City of Victoria with having obtained certain property by false pretences, was by him on 12th November instant, to use his own language, as appears from the proceedings, "bound over to answer any charge that might be brought against him at the next Court of competent jurisdiction."

I understand that the accused thereupon entered into a recognizance with sureties, in form conditioned, for his appearance at the then next sittings of the Court of Assize for this County and his surrender into custody to take his trial if any indictment should be found against him by the Grand Jury at such sittings.

It appears that the accused, before the holding of such Court, intimated to the counsel for the Crown the intention to elect for speedy trial, but that the right to do so in the circumstances was questioned by him, and on the 17th instant, no formal application for speedy trial having been made, the Grand Jury found a true bill upon an indictment against the accused in respect of the said charge.

The accused then applied to me in this Court for leave to elect for speedy trial, Mr. Helmcken and Mr. Mills appearing for him.

Mr. Cassidy, who appeared for the Crown, stated that he

did not wish to oppose this course, if permissible, but strongly pressed upon me that section 765 of the Code does not apply when the accused has been dealt with under section 601, as was done in this case, and referred me to Crankshaw, page 676, where that learned author evidently does seem to express an opinion to that effect.

No authority is, however, there given, nor has any been cited to me, and I am not aware of any case in which the point has been decided.

It was forcibly argued by Mr. Cassidy that unless and until indictment found there is in such a case no charge upon which a trial can be had, and that the indictment if and when found is itself the only charge.

I cannot accede to this view. Even if it were so, section 765 does not in terms refer to a commitment by a magistrate. I do not know that I would be prepared to hold, bearing in mind the object of this provision and having regard to the well-known rule for indictments of this kind, that such view is necessarily inconsistent with the existence of the right to elect as to mode of trial.

I am of opinion, however, that the accused has the right which he claims, on the ground that the words in section 765 "committed to gaol for trial," should not be confined to the technical or restricted sense contended for, but as meaning any case where the accused is found in custody charged with an offence of the kind, in respect of which the right of election is given. The settled practice in this province has been to allow such election, although the accused has never been received into custody at all, except in the way of his surrender merely for the purpose of appearing before the Judge for election, and the case of *Reg. v. Burke*, 24 Ont. R. 64, is authority, if other authority be wanted, that this practice is correct. Then, why should not the same course be pursued in cases like the present?

If the accused cannot find the bail required, the magistrate must commit him to prison; the condition of the recognizance is the same whether the accused is admitted to bail by the magistrate or by a Judge after commitment by the magistrate.

Whichever course is taken by the magistrate, the accused if out on bail may be surrendered by his sureties. Then, why may he not surrender himself for the purpose of being tried without awaiting the action of the Grand Jury, and having been taken into custody because of his having been charged with the offence and being kept there with a view to his trial upon the charge, why is the benefit of the right to elect to be denied him?

If the practice which has obtained is correct, I think that there is a right of election in cases like the present one.

A construction which would place the accused in a worse position when the evidence against him is slight than if overwhelming, and would permit a magistrate in any case, if so inclined, to deprive the accused of the right to elect, is not of course one from which I ought to shrink merely because of such actual or possible result, but it is proper to consider possible consequences in determining the question.

Reference may be made to *Reg. v. Johnson*, 8 L.J.M.C. 99; *Mullins v. Surrey*, 51 L.J.Q.B. 149; *Mews et al. v. The Queen*, 8 App. Cas. 339. (The words "committed for trial," used in relation to any person have now, by 52 & 53 Vic. (Imp.), cap. 63, sec. 27, been defined as regards subsequent legislation.)

As the circumstances here are not unlike those in *Reg. v. Burke*, 24 Ont. R. 64, the better course will be, following that case, that the indictment should be quashed.

*Indictment quashed.*

**Note:** *Election for trial without jury*—"Committed to goal for trial"—*Meaning of.*

Sec. 765 of the Criminal Code is as follows:—

"Every person *committed to goal for trial* on a charge of being guilty of any of the offences which are mentioned in sec. 539 as being within the jurisdiction of the General or Quarter Sessions of the Peace, may with his own consent (of which consent an entry shall then be made of record), and subject to the provisions herein, be tried in any province under the following provisions, [secs. 766-781]; out of sessions

**Note:** (*Continued*).

and out of the regular term or sittings of the court, whether the court before which, but for such consent, the said person would be triable for the offence charged, or the Grand Jury thereof, is or is not then in session, and if such person is convicted he may be sentenced by the judge."

This section of the Code is taken from the Speedy Trials Act, (Can.) 52 Vic., c. 47, s. 5, in which the same term "committed to gaol for trial" is used. In *R. v. Burke*, 1893, 24 Ont. R. 64, the defendants were committed for trial and admitted to bail, one defendant (Burke) on his own recognizance, and the others with bondsmen. Burke then surrendered himself to the sheriff, and his co-defendants were surrendered by their bondsmen; the sheriff, however, refused to receive any of them into the gaol, assigning as a reason that Burke was out on his own bail. Objection was also taken by the Crown that he could not therefore surrender to be tried by the County Judge, and that he must be in actual custody and confined in gaol before he could elect under the statute. It was held by the Common Pleas Division (Galt, C.J., MacMahon and Rose, JJ.) that Burke's co-defendants having been surrendered by their bail were in the custody of the sheriff notwithstanding his refusal to allow them into the gaol, and it was the sheriff's duty to confine them in gaol as the bondsmen were by the surrender released from their recognizance; and that defendant Burke bailed on his own recognizance had a right to "render" himself. *Nethersole's Bail*, 2 Chitty 99, followed.

"When the defendants were rendered by their bail, they stood in the same position as if they had never been bailed and were therefore "committed to gaol for trial." *R. v. Burke*, 1893, 24 Ont. R. 64, 72, per MacMahon, J.

The words "committed for trial to the assizes" were held in *R. v. Johnson*, 1839, 10 A. & E. 740, 8 L. J. M. C. 99, to include prisoners who had first been committed to the city prison, and thence taken for trial to the shire-hall of the county, and if convicted then committed to the county prison.

So also it has been held that the words "committed to



**Note :** (*Continued*),

prison" do not necessarily mean "received into prison," but, both in common parlance and in legal phraseology, mean "when the order is made under which the person is to be kept in prison." Lord Blackburn in *Mullins v. Surrey*, 1882, 51 L. J., Q. B. 145, 149.

The word "committal" signifies the act of the magistrate who issues the warrant of committal, and not the act of the officer who executes it by delivering the person therein named into the custody of the gaoler. *Mews v. The Queen*, 1882, 8 App. Cas. 332, 344 (H.L.)

Bail is custody, and a person admitted to bail is said by Wurtele, J., of the Court of Queen's Bench, Quebec, to be "constructively in gaol." *The Queen v. H. B. Cameron*, 1897, ante 169.

[SUPREME COURT OF CANADA.]

BEFORE SIR HENRY STRONG, C.J., AND TASCHEREAU,  
SEDGEWICK, KING AND GIROUARD, JJ.

**O'NEIL vs. THE ATTORNEY GENERAL OF CANADA.**

*Gaming house—Confiscation of money found in—Power of  
Deputy High Constable as a deputy chief constable—  
"Persona designata"—Officer de facto—  
Collateral attack—Cr. Code 575.*

1. For the purpose of seizing money, etc., found in a common gaming house under a statute giving authority to the "chief constable or deputy chief constable," it is not requisite that the officer acting should bear the exact title given in the statute, and it is sufficient if his functions and duties are such as to bring him within the designation there used.
2. A high constable, having a commission as such from the Crown and not exercising a delegated authority, can legally appoint a deputy to act during his temporary absence.
3. *Seemle*, the acts of a de facto officer, assuming to exercise the functions of an office to which he has no legal title, are, as regards all persons but the holder of the legal title, legal and binding.
4. A statutory provision by the Parliament of Canada, purporting to authorize a magistrate to adjudge forfeiture to the Crown of moneys, etc., found in a common gaming house, and declaring the keeping of a gaming house a criminal offence, and imposing punishment therefor, is not ultra vires, and the judgment of confiscation is not an interference with "property and civil rights," the jurisdiction in regard to which belongs to the provinces, although the party claiming the money was not a party to the proceedings in which the confiscation was decreed.
5. In an action to recover from the constable and the clerk of the peace the moneys so seized, the rules of evidence in force in the province in civil matters will apply, and not the Canada Evidence Act.
6. Per *Strong, C.J.*, a judgment of forfeiture in criminal proceedings is not subject to collateral attack in a civil action brought for the recovery of the moneys.

ARGUED : February 24 and 25, 1896.

DECIDED : March 24, 1896.

Appeal by the plaintiff, George O'Neil, from the judgment of the Court of Queen's Bench for Lower Canada (appeal side), affirming the judgment of the Superior Court for the District of Montreal, which dismissed the plaintiff's action with costs.

The Attorney General of Canada intervened in the action, and became respondent on the present appeal to the Supreme Court of Canada.

The high constable of the district of Montreal, (which includes the city of Montreal as well as a large territory adjacent thereto,) was appointed under a commission from the Crown in the year 1866, and has ever since then continued to hold that office. In 1885 he appointed a deputy, who thereupon took the oath of office, the attesting magistrate adding in the record of the oath the words "jusqu'au 1er mai, 1886." The deputy was never re-sworn, but has continued to act as such ever since then; and on the 14th October, 1893, in execution of a warrant issued on a report made by him by a police magistrate under the 575th section of the Criminal Code and addressed to him by name as "Deputy High Constable of the City of Montreal," he seized certain moneys and instruments in a common gaming house within the limits of the city of Montreal.

The section referred to empowers the magistrate to issue a warrant on receiving a report from "the chief constable or deputy chief constable of any city or town, or other officer authorized to act in his absence."

The plaintiff claims the money seized as his property which had been only temporarily deposited for safe-keeping in the vault in use in the rooms where the gambling was carried on, and brought action against the high constable and the clerk of the peace for the specific recovery of the moneys in their custody. The judgment of the court pronounced by His Lordship the Chief Justice contains a further statement of the case and the questions raised upon the appeal.

*Guerin* for the appellant. As the moneys are claimed under the legislative authority of the Parliament of Canada the law of evidence in this case would be subjected to the provisions of "The Canada Evidence Act, 1893." The court below improperly refused the plaintiff's testimony when tendered, and he is entitled to a new trial, and to be heard

as a witness in his own behalf. Canada Evidence Act, 1893, ss. 2, 3, 20 and 21.

The report and seizure were illegally made, the executing officer having no authority under sec. 575 of the Criminal Code, and no valid confiscation can be founded upon proceedings irregular and null ab initio. The strict interpretation called for in provisions leading to a forfeiture will not permit any officer to act unless specially designated. Only certain officers in cities and towns are mentioned, and "high constables" or their deputies are not included. The additional definitions given in the 4th and 5th clauses of the section make this very clear. Moreover, the deputy who acted in making the report and seizure was not deputy high constable at the time as he had been appointed and sworn only for one year from the 1st May, 1885, and was never re-appointed or re-sworn, and it does not appear that he was even a peace officer.

The confiscation of the moneys was illegal as the provision in sec. 575 therefor is an interference with property and civil rights in the province. British North America Act, sec. 92.

So far as the plaintiff was concerned, the judgment of the magistrate confiscating the moneys was not *res judicata*, for he was not a party or privy to the proceedings, and had no power to become a party or cross-examine witnesses in the prosecution of the keepers of the gaming house upon the information which led to the declaration of forfeiture.

The learned counsel cited the following authorities : Art. 1241 C.C.; *Casgrain v. Leblanc*, Q.R. 4 S.C. 350; Pothier, Obligations no. 897; Starkie on Evidence, pp. 217, 235, 237, 273; Greenleaf on Evidence, 14th ed., p. 537.

*Hall, Q.C.*, for the respondent.

[The Court stated that they only wished to hear argument as to the authority of the officer who made the report and seizure.]

The high constable is a common law officer holding his commission from the Crown, and is the "chief" or "principal" constable or peace officer of the whole district,

including the "city" of Montreal. He is an officer whose character and duties correspond exactly with the description of the officers mentioned in the 575th section of the code. The terms used in the section are merely descriptive of the character of the officer, and the particular title given in his commission is of no consequence. The code sets out, in the first place, the common law officers who may act, and by the 4th and 5th subsections certain municipal police officers are vested with similar powers. The high constable holds original authority from the Crown under his commission, and also at common law, and may perform ministerial acts by deputy. The deputy need not be sworn, but in this case the deputy, having once been appointed and taken the oath of office, the memorandum that he was sworn merely until a certain date is immaterial; he could and did lawfully hold over in his office as such deputy and was at the time of the seizure both *de facto* and *de jure* a constable and peace officer within the meaning of the section. See Bacon's Ab., Tit. Constable, oath of office; Chitty Crim. Law, vol. 1, p. 20.

OTTAWA, March 24, 1896.

THE CHIEF JUSTICE.—

This is an appeal from a judgment of the Court of Queen's Bench, which affirmed a judgment of the Superior Court rendered by Mr. Justice Delorimier.

The action as originally instituted was one against Adolphe Bissonnette, high constable of the district of Montreal, and Louis Wilfrid Sicotte, clerk of the peace of the same district, to revendicate certain specific moneys remaining in the hands of the defendants, which had been seized under a warrant granted by C. Aimé Dugas, Esquire, one of the police magistrates of the city of Montreal. The money in question was, by an order or judgment of the police magistrate before-named, dated the 18th October, 1893, ordered to be forfeited to the Crown for the public uses of Canada. The Attorney General of Canada having intervened in the action for the purpose of maintaining the

adjudication of forfeiture, the plaintiff contested his grounds of intervention, alleging that the money in question had been illegally seized and forfeited. The action was heard in first instance before Mr. Justice Delorimier in the Superior Court, who gave judgment for the Crown, and this judgment has been maintained upon an appeal to the Court of Queen's Bench by the unanimous judgment of that court. The reasons for the judgment of the Queen's Bench are fully stated in an opinion prepared by Mr. Justice Wurtele.

The Criminal Code, 1892, section 575, enacts as follows :

" If the chief constable or deputy chief constable of any city or town, or other officer authorized to act in his absence, reports in writing to any of the commissioners of police or mayor of such city or town, or to the police magistrate of any town, that there are good grounds for believing, and that he does believe, that any house, room or place within the said city or town is kept or used as a common gaming or betting house \* \* \* the said commissioners or commissioner, or mayor, or the said police magistrate, may, by order in writing, authorize the chief constable, deputy chief constable, or other officer as aforesaid, to enter any such house, room or place, \* \* \* and to seize \* \* \* all tables and instruments of gaming, and all moneys and securities for money \* \* \* found in such house or premises.

" The police magistrate or other justice of the peace before whom any person is taken by virtue of an order or warrant under this section, may direct any cards, dice, balls, counters, tables or other instruments of gaming \* \* \* seized under this Act in any place used as a common gaming house \* \* \* to be forthwith destroyed, and any money or securities seized under the section shall be forfeited to the Crown for the public uses of Canada."

On the 14th of October, 1893, Louis Seraphin Bissonnette, then acting as deputy high constable of the district of Montreal (which district includes the city of Montreal), wrote and delivered to C. Aimé Dugas, Esquire, a police

magistrate for the city of Montreal, the following report or letter :

" MONTREAL, 14th October, 1893.

" To MR. C. A. DUGAS,  
" Police Magistrate,  
" Montreal.

" SIR,—I beg to report to you that there are good reasons for believing, and I do believe, that the room composing the second flat of the house bearing the civic number twenty-two of St. Lawrence Main Street, in the City of Montreal, is kept and used as a common gaming house as defined in part XIV., section one hundred and ninety-six of the Criminal Code of 1892, and this since the first day of May last, or about.

" LOUIS S. BISSENETTE,  
" Deputy High Constable of the City of Montreal, authorized to act in the absence of High Constable Bissonnette of the City of Montreal."

On the same day Judge Dugas issued his warrant directed to the same deputy high constable, commanding him to enter the premises referred to in his letter, and, amongst other things, to seize all moneys and securities for moneys, found in the rooms referred to.

Under the authority of this warrant the deputy high constable on the same day made an entry into the rooms in question, and seized therein, amongst other things, the moneys sought to be recovered in the present action. By his return to the warrant, also dated the 14th October, 1893, the deputy high constable certified and returned that he had seized in the premises mentioned in the warrant the moneys now in question. On the 18th of October, 1893, Judge Dugas, by an order or adjudication under his hand ordered "that the said moneys so found and described as aforesaid be forfeited to the Crown."

The appellant now insists that these proceedings were irregular and illegal, for the reason that Louis Seraphin Bissonnette, who acted as deputy high constable, was not an

officer within the meaning of the section of the code before quoted.

Speaking for myself only, I am of opinion that the judgment, by which the money was declared forfeited to the Crown, cannot thus be collaterally impeached in this action brought against the high constable and the clerk of the peace for the specific recovery of the moneys seized.

But, assuming that in point of law this is not so, and that the action is maintainable if it be shown that Louis Seraphin Bissonnette was not a deputy chief constable within the meaning of section 575 of the code, for the reason that proceedings would have been in that case wholly without jurisdiction and void, I am still of opinion that there is no error in the judgment of the court below, inasmuch as Louis Seraphin Bissonnette, who acted as the deputy of his father, the high constable, was an officer qualified to make the report of the 14th October, 1893, upon which the seizure and subsequent proceedings were founded.

There can be no doubt or question that Adolphe Bissonnette, the father of Louis Seraphin Bissonnette, had been duly appointed by the provincial government of the late province of Canada, under the authority of a statute, to be the high constable of the district of Montreal, which includes the city, and that his appointment had been regularly made by a commission from the Crown which was in full force at the time when the information was laid, the warrant issued, and the seizure under it made. That the elder Bissonnette came within the description of chief constable, contained in section 575, is too plain for doubt. It is not of course requisite that the exact title of an officer acting under the statute should be that given in the Act itself; it is sufficient that his functions and duties are such as to bring him within the designation used in the statute. Then, it is conclusively proved by the evidence and established by the provincial Act under which Adolphe Bissonnette was appointed, that he was the chief constable of the district of Montreal, and that, although he was styled high constable, he was also the chief constable of the district. Had the high constable himself



acted there could be no doubt, in my opinion, that his acts would have been those of an officer within the words of the law, an officer 'de jure,' and therefore everything he did would have been strictly legal. Adolphe Bissonnette was, however, absent from Canada at the time the proceedings which led to the seizure and forfeiture of this money were taken, and he had appointed his son, Louis Seraphin Bissonnette, to act as deputy high constable. This is shewn by the evidence of both the Bissonnettes, who have been examined as witnesses.

That the high constable, a ministerial officer, the chief peace officer of the district, having himself original authority from the Crown, and in no sense exercising a delegated authority, could legally appoint a deputy, is, I think, too plain to require argument, Comyns Dig. 5 ed. Tit. Officer, p. 194; Bacon's Ab. 7 ed. Tit. Officer, p. 316.

A great deal has been made of the objection that Louis S. Bissonnette was not regularly sworn. But, in 1885, when he was first appointed to act as deputy high constable, he was duly sworn as such before Mr. Desnoyers, a judge of sessions, and one of the police magistrates of Montreal, and the book in which his oath is recorded has been put in evidence. It is true that there is a memorandum added by the clerk, who does not appear to have been authorized to make the entry, that this oath was limited to 1st May, 1886. This limitation of the oath, whatever it may mean, is however quite immaterial; we have the undoubted fact that the younger Bissonnette had been appointed deputy high constable, and that he took the oath as such. Then, there is abundant evidence to show that he had continuously acted as such deputy, from the date of taking the oath up to the time of the proceedings against the gambling house. Mr. Desnoyers' evidence is decisive as to this. Therefore, I hold Louis Seraphin Bissonnette to have been, not merely 'de facto,' but strictly 'de jure,' the deputy chief constable for the district of Montreal, answering in all respects to the description of that officer in section 575 of the code.

But even were this not so, and if the appellant's contention that Louis Seraphin Bissonnette is only to be regarded

as having been properly qualified to act as a regularly appointed and sworn officer for one year from 1st May, 1885, should be strictly correct in point of law, I should still hold that he de facto filled the office of deputy, and that being such de facto officer, the proceedings taken by him now impeached are not to be vitiated by reason of his not having annually renewed his oath of office. The rule of law is that the acts of a person assuming to exercise the functions of an office to which he has no legal title are, as regards third persons, that is to say, with reference to all persons but the holder of the legal title to the office, legal and binding. Especially is this so in the case of officers holding over and continuing to perform official duties after their term has expired. Further, this rule has been held to apply to a delegate of a delegate whose appointment would be manifestly without legal authority. Further, it has been held to apply even to judicial officers and a fortiori to those appointed for the performance of mere ministerial duties such as a head constable. And particularly it has been held to apply to officers who have failed to qualify themselves by taking an oath of office prescribed by law. See as to de facto officers, and generally, *O'Brian v. Knivan*, Cro. Jac. 552; *Leak v. Howel*, Cro. Eliz. 533; *Parker v. Kett*, 1 Raym. 658; *Rex v. Bedford Level*, 6 East 356; *Margate Pier v. Hannam*, 3 B. & Ald. 266; *Parker v. Baker*, 8 Paige (N.Y.) 428; *Brown v. Lunt*, 37 Me. 423; *The State v. Carroll*, 38 Conn. 449; Bac. Ab. (7 ed.) Tit. Offices & Officers; Comyns' Dig. (5 ed.) Tit. Officer D. 1, 2, 3. Under this state of the law (which, as being part of the general public law, must, I think, apply to all officers mentioned in the Criminal Code which applies to the whole Dominion, and is also, I conceive, the law of the province of Quebec,) I must hold that Louis Seraphin Bissonnette's acts were, even if those of an officer 'de facto' only, such as to furnish a sufficient foundation for the proceedings which resulted in the judgment of forfeiture now sought to be avoided.

There is, however, another objection to the appellant's right to recover this money, which would be fatal to his

action even if he had succeeded in showing that the judgment of forfeiture was an absolute nullity. In this action the onus is upon him to prove that the money seized belonged to him. It was not taken out of his possession ; therefore, no presumption of property arises in his favour from the fact of possession. The money was, at the time of seizure, in the actual possession of the persons who carried on the gambling establishment in the upper rooms of the house.

It has been argued that from the evidence we ought to conclude that the betting business carried on upon the ground floor was in no way connected with the gambling rooms upstairs, and that the appellant merely deposited his money in the safe for convenience. My conclusion would be the reverse of this. It is proved that the managers of the gaming tables were in the habit during the day time of acting as principals in the betting on horse races, which the appellant claims to have been his exclusive business, and that the money which formed the capital for both the racing and the upstairs business was mixed together and dealt with as a common fund, from which both the traffic which the appellant managed, and that carried on in a more secret manner in the rooms above, were supplied with cash. Upon the whole I think the inference drawn by both the Court of Queen's Bench and Mr. Justice Delorimier as to the ownership of the money was entirely correct, and, in the words of Mr. Justice Wurtel, "that the business which the appellant pretended to have carried on, and that carried on upon the premises used as a common gaming house, were both carried on for the benefit of the same parties."

The constitutional question as to the validity of the legislation applicable to the case is so destitute of any reasonable foundation that it calls for no observations. The same may be also said of the objection that the appellant was held to be incompetent as a witness in his own behalf, for there can be no doubt that the law of evidence to be applied was properly held to be that of the province of Quebec. Both these points were indeed disposed of by the unanimous opinion of the court upon the argument here.

The appeal should be dismissed with costs.

TASCHEREAU, J., took no part.

SEDGEWICK and KING, JJ., concurred in the judgment of the Chief Justice.

GIROUARD, J. (dissenting).—

This being a case of confiscation, the law under which it was made must be construed strictly. Article 575 of the Criminal Code of 1892 in certain cases authorizes "the chief constable or deputy chief constable of any city or town, or other officer authorized to act in his absence," to seize all tables and instruments of gaming and all moneys and securities for money. It seems evident to me that this article contemplates that the warrant of seizure should be made by a city or town officer, and not by a county or district officer, and this interpretation becomes clearer when we read paragraph 4 of the said article: "The expression chief constable includes chief of police, city marshal, or other head of the police force of any city, town or place." And paragraph 5 makes "deputy chief constable" include the deputies of the same officers.

The seizure and confiscation was made in this case by the deputy of the High Constable, Adolphe Bissonnette, who is admitted to be "High Constable of and for the district of Montreal." In my opinion he is not "the chief constable or deputy chief constable of any city or town, or other officer authorized to act in his absence," within the meaning of article 575 of the code.

If I were without authority, I might hesitate to come to that conclusion; but it seems to me that the point is clearly laid down in one or two cases. In *Freegard v. Barnes*, 7 Ex. 827, a warrant was directed to the constable of D., a parish in the county of W., and was delivered to the county constable of W. and executed by him. Held, that the warrant could not be executed by any other constable than by the constable of the parish, and consequently the execution by the county constable was illegal. This decision was affirmed in the case of *The Queen v. Sanders*, L.R. 1 C.C.R. 75. The warrant there was issued directed to "the constable of Gains-

borough," but was delivered to the superintendent of police for the district, and executed by one of the police constables under him. The question was: Was the arrest legal? The Court of Criminal Appeal decided that as the warrant "was directed to the constable at Gainsborough," that is, the parish constable only, it could not lawfully be executed by any other person.

True, High Constable Bissonnette has jurisdiction in the city of Montreal; but he is not the officer named in art. 575 to execute the seizures therein referred to, and therefore the seizure made by him was illegal. In 1895 the Parliament of Canada amended art. 575 in that respect, but of course that does not apply to the present case. I am, therefore, of opinion that the appeal should be allowed with costs, and the seizure declared illegal.

*Appeal dismissed with costs.*

Solicitors for the appellant: *Madore & Guerin.*

Solicitor for the respondent: *John S. Hall.*

**Note:** *Officers 'de facto'—Officers 'de jure.'*

An officer *de facto* is "one who has the reputation of being the officer he assumes to be, and yet is not a good officer in point of law." *R. v. Bedford Level*, 6 East 356, per Lord Ellenborough; *Parker v. Kett*, 1 Ld. Raym. 658; 12 Mod. 467.

The distinction between an officer *de jure* and an officer *de facto* is, that an officer *de jure* is one who has the lawful right or title without the possession of the office, while an officer *de facto* has the possession and performs the duties under the color of right without being actually qualified in law so to act. 19 Am. & Eng. Encyc. of Law, 394.

The distinction between an intruder or usurper of an office and a *de facto* officer is, that the former has no color of title to the office, and the latter has, by virtue of an appointment or election. *Fitchburg Ry. v. Grand Junction Ry.*, 1 Allen (Mass.) 552; *Petersilea v. Stone*, 119 Mass. 465.

A performance of official duties, with the acquiescence of

**Note :** (*Continued*).

the public for such a length of time as to raise a presumption of colorable right, will constitute the party an officer de facto. *Wilcox v. Smith*, 5 Wend. (N.Y.) 231.

So the acts of a justice of the peace, duly commissioned, but who has not qualified by taking the prescribed oath, or who has not the property qualification without which he is prohibited by statute from acting and is declared to be incapable of "being a justice," are sustained as valid if done in a judicial character and sufficient effect is given to the statute by considering it as penal upon the party acting; and therefore persons seizing goods under a warrant of distress, signed by a justice who had not taken the oaths required, are not trespassers because of the defect. *Margate Pier v. Hannam*, 1819, 3 B. & Ald. 266.

A justice acting contrary to the prohibitory clause of the statute is, in the absence of any provision therein by way of penalty or punishment, liable to prosecution by indictment. *Ibid*.

*Presumption of law—'de facto' officer.*

It is a general presumption of law that a person acting in a public capacity is duly authorized so to do. *R. v. Jones*, 2 Camp. 131; *Gordon's case*, 1789, 1 Leach's Crown Cases 581; *Berryman v. Wise*, 4 T.R. 366: but such presumption only stands till the contrary is proved. *R. v. Verelst*, 1813, 3 Camp. 431.

*Amendment of 1895.*

By Statute 58-59 Vic., 1895, Can. c. 40, a new section 575 was substituted for the original section as amended in 1894 (c. 57) containing the following subsections intended to remove all doubt as to the power of a "district high constable" or "deputy high constable" to act thereunder so far as the Province of Quebec was concerned; but the principal case is important as regards county high constables and other like officials in the other provinces.

The subsections of the 1895 Act referred to, are as follows:—

4. The expression "chief constable" includes the chief of the police, city marshal or other head of the police force of any such city, town, incorporated village or other municipality, district or place, and in *the Province of Quebec* the high constable of the district, and means any constable of a municipality, district or place which has no chief constable or deputy chief constable.

5. The expression "deputy chief constable" includes deputy chief of police, deputy or assistant marshal or other deputy head of the police force of any such city, town, incorporated village or other municipality, *district* or place, and in *the Province of Quebec* the *deputy high constable* of the district; and the expression 'police magistrate' includes stipendiary and district magistrates.

*Compounding a misdemeanor.*

It is not every misdemeanor the compounding of which is an offence. *Fallowes v. Taylor*, 7 T.R. 475; *Kier v. Leeman*, 9 Q.B. 371. An indictment will lie if the offence compounded is of such a public nature that its predominating feature is that the public must be protected against it as distinguished from misdemeanors essentially in the nature of private injuries. *State v. Carver*, 39 Atl. Rep. 973, (N.H.); 1 Bishop Cr. Law Sec. 711.

And the receipt of money in consideration of the non-prosecution of a charge for the infraction of liquor laws is indictable as compounding a misdemeanor of a public nature. *State v. Carver, supra*.

## [SUPREME COURT OF BRITISH COLUMBIA.]

BEFORE DRAKE, J.

## THE QUEEN v. SAUER.

(3 B.C. R. 308.)

*Liquor License—Exception allowing supply of liquor to guests with their meals—"Meals" defined—Device intended to evade statute.*

1. Under a statute prohibiting during certain hours the sale of liquor by licensees and providing by way of exception that its provisions shall not apply to restaurant keepers supplying liquor to their guests with meals, a conviction is proper if the supplying of food was used merely as an excuse to enable the licensee to supply liquor.
2. The word "meal" in such a statute is to be interpreted as applying to food that is eaten to satisfy the requirements of hunger.
3. The supplying of crackers and cheese at a price which included the intoxicating liquor without further charge if required, does not constitute a "meal," but is a mere device intended to evade the statute.

DECIDED : October 16, 1894.

Appeal, under the Summary Convictions Act, Stat. B.C., 52 Vic., Cap. 26, Sec. 70, from a conviction of the defendant under the Liquor License Regulation Act, 1891, 54 Vic. B.C., Cap. 21, Sec. 4, for selling liquor within prohibited hours on Sunday on his premises licensed as a saloon and restaurant. The facts fully appear from the judgment.

*S. Perry Mills*, for the appeal.

*W. J. Taylor*, contra.

VICTORIA, B.C., Oct. 16, 1894.

DRAKE, J.—

The appellant is owner of the Bank Exchange saloon and restaurant, and pays a saloon as well as a restaurant license. The saloon is at one end of the building, divided from the restaurant by a room used by guests to play cards and eat lunch. The appellant supplies on week



days what is called a free lunch—that is, customers pay for the liquor they consume and have a lunch given them.

The evidence shows that on ordinary days the appellant charges ten cents for a glass of beer; on Sundays he charges 15 cents, and makes the waiter offer the customers a plate of crackers and cheese. The plate of crackers and cheese is a general plate offered to every one who calls for liquor. If a customer should ask for crackers and cheese he would charge 15 cents, but if he has a glass of beer with it he is charged no more.

It is a fact admitted that Charles Freedman came in during prohibited hours and called for beer. The barkeeper refused to serve him unless he ordered what is called a meal, and he was supplied with crackers and cheese, for which he paid the regular Sunday price of 15 cents, which included his beer.

The appellant's contention is that this is a service of liquor to a guest by a restaurant keeper with his meals. That a meal is an unknown quantity and varies with the appetite of the customer, and therefore any food put down by a person holding a restaurant license beside a person drinking, complies with the Act. The Act has to be read as *loquitur ad vulgus*, giving to the words their ordinary meaning. Now picking a crumb of biscuit as an excuse for drinking is not eating a meal. I consider the term "meal" in the Act as applying to food that is eaten to satisfy the requirements of hunger, and in the present case it is quite clear that the biscuits were merely used as an excuse to enable the appellant to supply liquor. If the contention of the appellant is good, any fragment of food would enable a saloon-keeper to evade the Act, if offered to a customer, and whether consumed or not. The liquor here was not supplied by the ordinary restaurant waiters, nor was it supplied in the restaurant, but it was supplied from the saloon bar, and this Sunday plate of biscuits duly put in an appearance.

Section 4 of the Act states that "no sale or disposal of liquor shall take place on the premises where in ordinary circumstances liquor may be sold, nor shall liquor be drunk

in such places during the prohibited hours." The room in which the liquor was consumed is part of the licensed premises, and the appellant calls this room a restaurant for 15 cent meals, chiefly consisting during the prohibited hours, of biscuits. In my opinion the appellant has not brought himself within the exception, and I therefore confirm the conviction with costs.

I think in cases where a saloon is carried on as well as a restaurant in the same building that the license should clearly define the limits of each business, and that the bar-rooms should not have open communication with the restaurant.

The Municipal Council have power to pass by-laws prescribing the form and conditions of the licenses to be granted by the Commissioners and to regulate the same, but at present this Council has not thought fit to exercise this power. In my opinion there is no subject of greater importance for the Council to deal with than this subject of licenses.

*Conviction affirmed.*

**Note:** *Liquor License (B.C.)—"Sale or other disposal" in prohibited hours.*

The Liquor License (B.C.) Regulation Act, 1891, c. 21, s. 4, referred to in the judgment, provides as follows :

4. In all places where liquor is or may be sold by wholesale or retail, no sale or other disposal of the said liquor shall take place therein, or on the premises thereof, or out of or from the same, to any person or persons whomsoever, from or after the hour of eleven of the clock on Saturday night till one of the clock on Monday morning thereafter, nor during any further time on the said days, nor any hours or other days, during which by any statute in force in this province, or by any by-law in force in the municipality wherein such place or places may be situated, the same or the bar-room or bar-rooms thereof ought to be kept closed, save and except in cases where a requisition for medicinal purposes, signed by a licensed medical practitioner, or by a

justice of the peace, is produced by the vendee [purchaser *in Revised Act of 1897*] or his agent; nor shall any liquor, whether sold or not, be permitted to be drunk in any such places during the time prohibited by this Act for the sale of the same, except by the occupant or some member of his family :

(1) Any infraction of this section shall be punishable for a first offence by a fine of not less than \$20 or more than \$50, and for a second offence by a fine of not less than \$30 nor more than \$100, to be recoverable in either case with costs upon summary conviction :

(2) The provisions of this section shall *not apply* to the furnishing of liquor to bona fide travellers, nor to the case of hotel and restaurant keepers supplying liquor *to their guests with meals*.

The above section has been re-enacted in the same form, except that the word "purchaser" has been substituted for the word "vendee" as indicated *supra*, as section 7 of the B.C. Liquor Traffic Regulation Act, R.S.B.C. 1897, c. 124.

Under a similarly worded section of the Ontario "Liquor License Act," the phrase "sale or *other disposal*" was held to include a gift of liquors made by the proprietor to a personal friend in a private room of the hotel. *R. v. Walsh, ante*, 109.

## [COURT OF QUEEN'S BENCH, QUEBEC.]

[APPEAL SIDE.]

BEFORE SIR A. LACOSTE, C.J., BOSSÉ, BLANCHET, HALL  
AND WURTELE, JJ., SITTING AS A COURT  
FOR CROWN CASES RESERVED.

## THE QUEEN v. FRANCE.

*Information—Common gaming house—Disorderly house—Jurisdiction of Judge of the Sessions of the Peace—Associated words—Rule of interpretation—Cr. Code 196, 198, 783 (f).*

1. An information should give a concise and legal description of the offence charged, and should contain the same certainty as an indictment, and the description of the charge must include every ingredient required by the statute to constitute the offence.
2. The statement of the offence may be in the words of the enactment describing it or declaring the transactions charged to be an indictable offence.
3. The absence or the insufficiency of particulars does not vitiate an indictment nor an information; but if it should be made to appear that there is a reasonable necessity for more specific information, the court or magistrate may, on application of the accused person, order that further particulars be given, but such an order is altogether within the judicial discretion of the judge or magistrate.
4. Cr. Code, sec. 783 (f), enacting that whenever any person is charged before a magistrate with keeping or being an inmate or habitual frequenter of any disorderly house, house of ill-fame or bawdy house, the magistrate may hear and determine the charge in a summary way, does not apply to the offence of keeping a common gaming house.
5. The meaning of the words "disorderly house" in Cr. Code, sec. 783 (f) and sec. 784, is governed by the rule *noscitur a sociis*, and is therefore restricted to houses of the nature and kind of a house of ill-fame or bawdy house.
6. It is immaterial whether the generic term precedes or follows the specific terms which are used; in either case the general word must take its meaning, and be presumed to embrace only things or persons of the kind designated in the specific words.

MONTREAL, February 15th, 1898.

BOSSÉ, J. (dissenting)—

Jesse France, W. E. Potter and Ephrem Lemay were charged before the Judge of the Sessions of the Peace, for the City of Montreal, with having unlawfully kept, on the

and December, 1896, and for some time previous thereto, in the City of Montreal, a disorderly house ; to wit, a common gaming house.

Two objections have been made by the defence : first, that the complaint was insufficient, and did not disclose any offence ; secondly, that the magistrate had no jurisdiction to try this case, that the accused were entitled to a trial by jury, and that they could not be tried summarily without their consent.

The magistrate heard the evidence and found the accused guilty ; but he has reserved for this Court the two objections, which he has stated in his report, or case, as follows :

1. Was the information sufficient in law ?
2. Had I the power to summarily try and convict the appellants without their consent ?

The first question appears scarcely to give rise to any difficulty.

We are all of opinion that the complaint or information was sufficient, inasmuch as it charged the defendants with having unlawfully kept a disorderly house—that is to say, a gaming house, and that the offence thus described in the complaint is so described in the same terms as the article of the Criminal Code which defines this offence.

It is possible that the accused for the purposes of their trial, or the advantage of their defence, could have demanded and obtained details or particulars ; but they have not seen fit to do so, and the magistrate could not of his own motion order the prosecution to furnish these details.

The second question is more serious.

Had the Judge of the Sessions of the Peace jurisdiction to hear and decide this complaint without the consent of the accused, as they claim, or rather—and to put the question in a more absolute and perhaps more exact manner—had the Judge of the Sessions of the Peace, in this case, absolute jurisdiction to hear and decide this complaint, with or without the consent of the accused, or else should the trial have been submitted to the Court of Queen's Bench ?

Paragraph f of article 783 of the Criminal Code declares that, when a person is charged before a magistrate "of keeping . . . any disorderly house, house of ill-fame or bawdy house, he (the magistrate) may hear and determine the charge in a summary way."

And article 784 :—"The jurisdiction of such magistrate is absolute in the case of any person charged with keeping . . . any disorderly house, house of ill-fame or bawdy-house, and does not depend on the consent of the person charged to be tried by such magistrate, nor shall such person be asked whether he consents to be so tried."

The appellants say : It is a rule of interpretation that, when several words are found in the same phrase or provisions, they must be interpreted the one by the other, and that the natural meaning of the one must give way to the meaning of the word designating the principal thing, if the other words only designate accessories or things of the same category as the principal word.

It is the old rule of words associated the one to the other to explain but one common idea ; and the accused, applying this rule to paragraph f, maintain that the principal idea is the bawdy house, which is at the same time a house of ill-fame and a disorderly house ; that, consequently, all of this section f has in view only the bawdy house, and that the jurisdiction given to the magistrate to try charges of having kept a bawdy house, being thus limited by paragraph f, is not given to him to try the charge of keeping a gaming house or a betting house.

There is no doubt that this rule of associated words has been, from all time, recognized, but it is far from being absolute ; it can never be applied when it conflicts either with the general meaning of the phrase or with a special provision of the law. Nor can it be applied if there exists some index showing that the intention of the legislators has not been to group all the words in question in such a way as to give them the same meaning, which would be different from the ordinary meaning of each of these words.

In fine, it is a rule of subsidiary interpretation that can

only be invoked in default of primary rules and when a reasonable meaning cannot be otherwise given to the phrase.

If the provision can apply in a reasonable manner, in giving to each word its original meaning, and if, in so doing, it does not conflict with a special provision; if, especially, the interpretation thus given be reasonable, the law must in preference be given the whole meaning, and effect must be given to each of the words which the legislator has used. We cannot suppose that he has gathered expressions having a different meaning in order to give a single and same meaning, without having some good reason for doing so.

But in the case before us we have, I believe, all the different elements which I have mentioned to show that this rule of associated words cannot, in any way, receive its application.

The different offences of keeping a bawdy house, a gaming house and a betting house are specially and specifically defined by the code.

Thus, by article 195, "a common bawdy house is a house . . . kept for the purposes of prostitution."

Article 196: "A common gaming house is a house . . . to which persons resort for the purpose of playing at any game of chance."

Article 197: "A common betting house is a house . . . opened, kept or used for the purposes of betting between persons resorting thereto."

Here are, therefore, each of the three offences clearly defined.

Now, what is the punishment for these offences? Article 198: "Everyone is guilty of an indictable offence, and liable to one year's imprisonment, who keeps any disorderly house; that is to say, any common bawdy-house, gaming house or common betting house, as hereinbefore defined."

The three offences are put on the same footing; they are all three punishable by one year's imprisonment, and by the same article the law declares that the bawdy house, the gaming house and the betting house are, each and all, disorderly houses. And the provision is so precise that it

declares a disorderly house the "common betting house as hereinbefore defined," i.e., "a house to which persons resort for the purpose of playing at any game of chance."

It therefore seems to me clearly established that a gaming house is a disorderly house in the meaning of the Code, and that, consequently, each time that the Code uses the expression "disorderly house" in one of its provisions it must be conclusively said that it includes in this qualification the bawdy house, the gaming house and the betting house. These are the very terms of article 198: "disorderly house; that is to say, bawdy house, gaming house or betting house."

Let us now read article 783: "When any person is charged before a magistrate . . . with keeping any disorderly house, house of ill-fame or bawdy house . . ." what meaning can this provision have unless that which article 198 has just given, namely, "disorderly house; that is to say, bawdy house, gaming house or betting house"? And the words, "house of ill-fame or bawdy house," in section f, can only be descriptive to such an extent that the words, "house of ill-fame," which section f uses, are not to be found in the three definitions of disorderly house which articles 195, 196 and 197 give as such, and are subject to repressive provisions.

From this, in my opinion, this rule of associated words cannot here be applied.

Not only in this case would this application have the effect to strike out of paragraph f the words "disorderly house," which would no longer have any meaning and would be a dead letter, but in the interpretation which the defence submits it would be necessary to say that a disorderly house does not mean gaming house, and that, because the words are found in the provision preceding the words bawdy house.

And, nevertheless, we have seen a special provision of the Code declaring that bawdy houses, gaming houses and betting houses are all put on the same footing and all three declared disorderly houses.

These words, "disorderly house," in ordinary language



do not include gaming house. Nor probably would they be included in the ordinary legal meaning, at least in this country; so much so that the legislator has ascribed to them the special meaning which he understands them to have when he used them in the Code.

So much for the strict interpretation of the text.

But there is another reason which would perhaps be alone sufficient to reject the interpretation of the defendants. It is that bawdy houses, gaming houses and betting houses are all contrary to good morals and to public order, and under this same head each of them must be put down. All three enter into the same category of offences; they are associated not by words but by their nature.

For this reason our legislators have united them in the same provision, article 783, paragraph f, in order to give to the same magistrate the same jurisdiction to try persons accused of having kept one or the other of these houses.

The association of words invoked by the defence exists only on account of the association of the nature of these offences, and, consequently, there is no ground in the case for the rule which they invoke.

In fact, and as reason for the provision, it was natural that these offences, being all contrary to good morals and public order, should be submitted to the same Judge and put in the same footing for trial, just as they are placed on the same footing by the Code for the punishment which can be imposed.

For these reasons, I believe that the Judge of the Sessions of the Peace had jurisdiction to hear and decide the information in question.

WURTELE, J., rendering the judgment of the majority of the Court, said :—

The defendants were charged, before M. C. Desnoyers, Esq., one of the Judges of the Sessions of the Peace for the City of Montreal, with having unlawfully kept on the 2nd of December, 1896, and for some time previous thereto, a common gaming house at Nos. 178, 238 and 240 St. James Street in the City of Montreal.

They were brought before the magistrate and were tried summarily without their consent, under the provisions of the Criminal Code, relating to the summary trial of indictable offences, and they were found guilty, and were condemned to pay a fine of \$10 each and the costs incurred in the case, amounting to \$45.50, and, in default of the immediate payment of the fine and costs, to be imprisoned at hard labor for the space of one month.

When called upon to plead, the defendants in the first place objected to the information, contending that it was insufficiently libelled; and then they objected to the jurisdiction of the magistrate, contending that they were not liable to be tried summarily without their consent, and that they were entitled to a trial by jury.

Article 195 of the Criminal Code defines a common bawdy house to be a house, room, set of rooms or place of any kind kept for purposes of prostitution. Article 196 defines a common gaming house to be a house, room or place kept by any person for gain to which persons resort for the purpose of playing at any game of chance or at any mixed game of chance and skill; and article 197 describes what a common betting house is. Then article 198 enacts that it is an indictable offence, for which an offender is liable to one year's imprisonment, to keep any disorderly house; that is to say, any common bawdy house, common gaming house or common betting house, as defined in the three previous articles.

The defendants were charged with the commission of an offence under articles 196 and 198, and they were proceeded against under the provisions of part 55 of the Criminal Code, which relates to the summary trial of indictable offences.

Article 783 of this part of the Criminal Code enacts that, whenever any person is charged in the Province of Quebec before a Judge of the Sessions of the Peace with having committed certain indictable offences which are enumerated in that article, such magistrate may, with the consent of the accused, hear and determine the charge in a summary way. Paragraph f of this article includes among these offences the

offence of keeping or of being an inmate, or habitual frequenter, of a disorderly house, house of ill-fame or bawdy house ; and article 784 provides that in the case of a person being so charged the jurisdiction of the magistrate is absolute, and does not depend on the consent of the accused.

The defendants applied for a reserved case—first, on the decision rendered by the magistrate, declaring that the information was sufficient in law ; and secondly, on his other decision, declaring that his jurisdiction in the matter was absolute and did not depend on the consent of the defendant to be tried in a summary way. The magistrate reserved both questions for the opinion of the Court of Appeal, and respite the execution of his sentence till the questions reserved should be decided.

The questions reserved and submitted to this court are the following :—

First—Was the information sufficient in law ?

Second—Had the magistrate power to summarily try and convict the appellants without their consent ?

The first question submitted by the reserved case relates to the sufficiency of the information. In the information it is charged that the defendants, being managers and employees of the Canadian Royal Art Union, Limited, a body politic and corporate, had unlawfully on the 2nd of December, 1896, and for some time previous thereto, at the city of Montreal, kept a disorderly house, that is to say, a common gaming house, at Nos. 178, 238 and 240 of St. James Street. It is only required in criminal matters that the information should give a concise and legal description of the offence charged, and that it should contain the same certainty as an indictment. Of course the description of the charge must include every ingredient required by the statute to constitute the offence. As, in an indictment, the statement of the offence may be in the words of the enactment describing it or declaring the transaction charged to be an indictable offence. In the case of *R. v. Taylor* (3 Barnewall & Cresswell's Reports, K.B.), Holroyd, J., said that, in his opinion, it was sufficient merely to

allege that the defendant kept a common gaming house. It is essential that whatever words may be used should be sufficient to give the accused notice of the offence with which he is charged, and to identify the transaction referred to. The absence or the insufficiency of particulars does not vitiate an indictment nor an information ; but if it should be made to appear that there is a reasonable necessity for more specific information, the court or magistrate may, on the application of the accused person, order that further particulars be given, but such an order is altogether within the judicial discretion of the judge or magistrate. In the present case the defendants did not ask for further particulars, but moved that the information should be quashed and set aside, because it did not disclose the facts which constituted the offence in a clear and explicit manner. The information, however, was sufficient in law and therefore could not be quashed and set aside for the reasons alleged by the defendants ; and as they did not ask for particulars, the Magistrate was not required of his own motion to order that any further particulars should be given. We are of opinion that the Magistrate's decision was correct ; and we, therefore, answer to the first question of law submitted for our opinion, that the information as laid was sufficient in law.

The other question submitted, which is the more important of the two, is whether the Magistrate had power to summarily try and convict the defendants without their consent.

The charge against the defendants was laid under sections 196 and 198 of the Criminal Code, accusing them of having kept a common gaming house in the city of Montreal. This offence under the last mentioned article is an indictable one punishable by one year's imprisonment.

The prosecution was, however, brought under part 55 of the Criminal Code, which provides for the summary trial in certain cases of indictable offences and more especially under sec. F of art. 783, which provides that whenever any person is charged before a judge of the Sessions of the Peace with

keeping or being an inmate or habitual frequenter of any disorderly house, house of ill-fame or bawdy house, he may be tried in a summary way. Art. 784 provides that in such case, the jurisdiction of the Magistrate is absolute and does not depend upon the consent of the person charged.

If the case fell under the scope of art. 783 there could be no doubt whatever that the jurisdiction of the Magistrate was not dependent upon the consent of the accused, and that his jurisdiction would have been absolute.

But a very serious question arises in this matter. It is not as to whether the jurisdiction of the magistrate was dependent on the consent of the accused, but whether he had any jurisdiction at all over the matter, whether the jurisdiction conferred by section F. includes the offence defined in article 196, which by article 198 is made an indictable offence, triable before the Court of Queen's Bench. Jurisdiction to try in a summary way persons charged with keeping a house of ill-fame or a bawdy house, which is declared to be an indictable offence by articles 195 and 198, is clearly given to a judge of the Sessions of the Peace, by articles 783 and 784, but the offence with which the defendants are charged is that of having kept a common gaming house, and it is contended that jurisdiction is given to the magistrate for such an offence, by the word "disorderly house," contained in articles 783 and 784. The point, therefore, to be considered, is whether the word "disorderly house," when used in these two articles, can be construed to refer to a common gaming house. It is to be observed that the word "disorderly house" is associated with the words house of ill-fame or bawdy house; and such being the case, we have to see how it has to be construed, whether it can be held to include a common gaming house or whether its meaning is restricted by the words, house of ill-fame or bawdy house, which immediately follow it, and with which it is associated. A reference to the rule laid down with respect to associated words by the writers on the interpretation of statutes, will give us an answer to this question.

Endlich (on the Interpretation of Statutes), at No. 400, writes: "They (associated words) take, as it were, their color

from each other ; that is, the more general is restricted to a sense analogous to the less general."

Sedgwick, on Statutory Law, on page 423, says : "Where general words follow particular words, the rule is to construe the former as applicable to the things or persons particularly mentioned."

Maxwell, on the Interpretation of Statutes, on page 469, lays down the principle in these words : "The general word which follows particular and specific words of the same nature as itself takes its meaning from them and is presumed to be restricted to the same genus as those words ; or, in other words, as comprehending only things of the same kind as those designated by them, unless, of course, there be something to show that a wider sense was intended."

In the American and English Encyclopedia of Law, under the word Statutes, on pp. 439 and 441, we find the following paragraphs. :—

"Associated words—*Noscitur a sociis*—It is a fundamental principle in the construction of statutes that the meaning of a word or phrase may be ascertained by reference to the meaning of other words or phrases with which it is associated.—The rule is embodied in the familiar maxim *Noscitur a sociis*."

"The most frequent application of this rule is found where specific and generic terms of the same nature are employed in the same Act, the latter following the former. While in the abstract, general terms are to be given their natural and full signification, yet where they follow specific words of a like nature they take their meaning from the latter, and are presumed to embrace only things or persons of the kind designated by them."

Paragraph 9, of section 92, of the B.N.A. Act, 1867, enacts that provincial legislatures may make laws in relation to "shop, saloon, tavern, auctioneer and other licenses in order to the raising of a revenue for provincial, local or municipal purposes."

In interpreting this paragraph, Mr. Justice Wilson, in the case of *Regina v. Taylor*, which is reported in 36 Upper

Canada Q.B. Reports on p. 198, says: "The effect of the words 'and other licenses' must be determined by the rule adverted to of *noscitur a sociis*. They seem to have a proper connection with, and affinity to, those licenses which are 'commonly mentioned and found along with shop, saloon, tavern and auctioneer licenses and which are chiefly contained in the Municipal Act, such as licenses on billiard tables, victualling houses, ordinaries, houses where fruit, etc., are sold, hawkers and peddlers, transient traders, livery stables, cabs, intelligence offices, and perhaps other licenses in the regulation of markets and in some other cases.'"

And in the same case, on p. 222, Chief Justice Draper says: "It is contended that the words 'other licenses' are limited by the preceding words, and that the maxim *noscitur a sociis* must be applied. This objection is founded on the rule that 'a general word following specific words must be taken to mean something of the same kind;' or, as is elsewhere stated, 'when a word of wide signification follows others of a signification less wide, it must be interpreted as having a meaning bringing it within the same class as those others.' Therefore, 'other licenses' mean licenses of the same character as those just previously mentioned, viz:—shop, saloon, tavern, and auctioneer, which are licenses to carry on a particular business, or to exercise a particular vocation.'"

It is immaterial whether the generic term precedes or follows the specific terms which are used. In both cases, the general word must take its meaning, and be presumed to embrace only things or persons of the kind designated in the specific words.

If we apply this principle to the present case, it is obvious that the word "disorderly house," which precedes the words "house of ill-fame or bawdy house," in articles 783 and 784, is restricted in its meaning and can only embrace houses of the nature and kind of a house of ill-fame, or bawdy house, and does not comprise common gaming houses, which are houses or places of a different nature and kind.

If the word "disorderly house," used in section F of article 783 and in article 784, should embrace common gaming houses as well as houses kept for the purpose of prosti-

tution, it would also include common betting houses. If the word "disorderly house" had been used alone, it would, by connecting and construing it with articles 195, 196, 197 and 198, have comprised the three kinds of houses, but, instead of being used alone, the word "disorderly house" is associated with other words, describing houses of one single nature and kind, and the association of it with these other words, shows that it is not used in its general and wide sense, and necessarily restricts it to the meaning of such particular and specific words. If it had been the intention of Parliament to extend the jurisdiction to the three kinds of houses, certainly the word "disorderly house" would have been used alone.

By referring to previous legislation we can also see how the word "disorderly house" in part 55 of the Criminal Code should be construed. Paragraph F of article 783 and article 784, are taken textually from sections 3 and 4 of chapter 176 of the Revised Statutes of Canada, known as "The Summary Trials Act." Before the Criminal Code, keeping a common gaming house was a common law offence, and the statutory provisions respecting the keeping of common gaming houses contained in articles 196 and 198, did not exist. The only statutory provisions with respect to common gaming houses, were those contained in chapter 158 of the Revised Statutes of Canada, which authorized an entry to be made in them by the chief constable and his assistants, the seizure of the tables and instruments of gaming found by such officers in them, and the confiscation of such tables and instruments of gaming, but enacted no penalty against the keepers. It decreed, however, that persons playing or looking on were liable to a fine on summary conviction. Keeping a bawdy house or house of ill-fame was also a common law offence, but a statutory provision respecting vagrants also made it a misdemeanor, punishable either on summary conviction before two justices of the peace or under the Summary Trials Act. The law making the keeping of a common bawdy house or house of ill-fame a misdemeanor is contained in section 8 of chapter 157 of the Revised Statutes of Canada, and the word "disorderly house" is also used and is associated with the specific words.



The law reads as follows :—" All persons who are keepers or inmates of disorderly houses, bawdy houses or houses of ill-fame or houses for the resort of prostitutes . . . . . shall be deemed guilty of a misdemeanor and shall be liable to a fine . . . . or to imprisonment . . . or . . . to both," and it is obvious that the general word "disorderly house" which is there associated with the specific words is necessarily restricted to houses of the same nature or kind as those described by such other words, or in other words that the word "disorderly house," which is one of wide signification, must be interpreted as having a meaning bringing it strictly within the class of those of a less wide signification with which it is associated. Such being the case, and moreover, there having been at that time no enactment making the keeping of a common gaming house a statutory offence or misdemeanor, the word "disorderly house" used in sections 3 and 4 of the Summary Trials Act, which provide for the punishment of persons violating the enactment just quoted, had necessarily to be construed in the same manner and to be restricted in its meaning to houses kept for purposes of prostitution. Before the Criminal Code the word "disorderly house" was only used in the statutes in conjunction with the words house of ill-fame or bawdy house, and in fact as their synonym. Paragraph F of article 783 and article 784 of the Criminal Code are simply reproductions of the former provisions, and the word "disorderly house" used in them must therefore necessarily be interpreted and understood in the same way, as there is nothing to show that a wider sense was intended.

This being the case a judge of the Sessions of the Peace, is vested with no summary jurisdiction over the offence of keeping a common gaming house by part 55 of the Criminal Code, and while the defendants only contended that the judge of the Sessions of the Peace had no jurisdiction inasmuch as they had not given a consent to be tried in a summary way, as a matter of fact, the judge of the Sessions of the Peace had no jurisdiction in the matter even with their consent. The offence with which the defendants are charged is an indictable offence for which the offender

can be tried by a jury in the Court of Queen's Bench without his consent, or for which he can have with his consent a speedy trial under part 54 of the Criminal Code before a judge of the Sessions of the Peace.

It is contended in the defendant's factum, that Section F of article 783 and article 784 constitute an offence separate and distinct from that created by articles 196 and 198 of the Criminal Code, and that the provisions of the two first mentioned articles do not relate simply to a matter of procedure ; whether this be so or not, cannot, however, affect in any way the decision of this court on the second question of law submitted to it, for in either case the meaning of the word "disorderly house" has to be ascertained ; and to do so we must apply the rules which I have enunciated ; and this would lead to the same result in either case.

The majority of the court are of opinion, and answer the second question of law by saying that the Judge of the Sessions of the Peace had no power whatever to summarily try the defendants either with or without their consent under the provisions of part 55 of the Criminal Code. Under this part of the Code, a summary trial takes place before the accused has been committed for trial. Under part 54 of the Criminal Code provision is made for the speedy trial of indictable offences before a judge of the Sessions of the Peace, and such judge has, when the accused consents to be tried before him, jurisdiction to try all cases over which the court of General Sessions of the Peace has jurisdiction, but the accused is only brought before the judge and given the option of a speedy trial, or of a trial by jury after a preliminary enquiry and committal for trial.

In the present case, no preliminary investigation had taken place, and the accused had not been committed for trial, and the judge of the Sessions of the Peace had therefore no jurisdiction either under part 54 or under part 55 of the Criminal Code. The conviction in this case against the accused is therefore quashed and set aside.

The formal judgment of the court will be recorded in the following words :

" After having heard counsel for the Crown and on behalf of the defendants, and after due deliberation had on the case transmitted to this court by M. C. Desnoyers, Esquire, one of the judges of the Sessions of the Peace for the city of Montreal;

" It is considered and adjudged, and finally determined by the court now here, pursuant to the provisions of the Criminal Code in that behalf, that an entry be made on the record to the effect that in the opinion of the court :

" 1. The information laid against Jesse France, William E. Potter and Ephrem Lemay, charging them with having, on the 2nd day of December, 1896, and for some time previous thereto, in the city of Montreal, being the managers and employees of the Canadian Art Union (Limited), a body politic and corporate, unlawfully kept a disorderly house, that is to say a common gaming house, at Nos. 178, 238 and 240 of St. James Street, is sufficient in law.

2. The magistrate had no power or jurisdiction to try and convict the defendants for the offence above described under the provisions of articles 783 and 784 of the Criminal Code, either with or without their consent, but, if they had been committed to gaol for trial after a preliminary enquiry, he might, on their consent having been given to be tried without a jury, have tried, and convicted them under the provisions of part 54 of the Criminal Code respecting speedy trials of indictable offences.

And consequently, it is ordered that the conviction of the defendants made by the above named judge of the Sessions of the Peace on the 2nd day of April, 1897, be for the reason given with respect to the second question of law, quashed and set aside and that an entry on the record be made of the present judgment and order of this court."

*Conviction quashed.*

*W. J. White*, for defendants France and Lemay.

*A. W. Patrick Buchanan*, for defendant Potter.

*O. Desmarais*, Crown Prosecutor.

**Note :—***Construction of statute—Generic terms—Associated words.*

See *The Queen v. Walsh*, ante, p. 109 and Note p. 112.

## [SUPREME COURT OF BRITISH COLUMBIA.]

BEFORE DRAKE, J.

## THE QUEEN v. PEARSON.

*Municipal trade license—" Wholesale trader " defined.*

1. A manufacturer of clothing who sells the manufactured goods in quantities to be resold by his vendees by wholesale is a wholesale trader within the meaning of a municipal license law imposing a tax, with penalty for default in payment, upon every person carrying on the business of a " wholesale merchant or trader."

DECIDED : December 7, 1894.

Case stated by Farquahar Macrae, Esq., Police Magistrate of Victoria, for the opinion of the Supreme Court upon a conviction of the defendant for carrying on a wholesale business without the license required by law.

*A. L. Belyea*, for the defendant.

*D. M. Eberts*, A.G., contra.

DRAKE, J.—

Appeal by defendant on a case stated by the Magistrate from a conviction by him dated January 7th, 1893, of the defendant, for carrying on a wholesale business without having taken out a wholesale license.

The case was settled and signed on August 6th, 1894, and is now brought on for argument.

The case finds that the defendant carried on business in Victoria under the description "T. B. Pearson, wholesale woollen importer and manufacturer;" that he had no license as a wholesale trader; that he imported material, and out of those imported materials he manufactured certain articles of clothing and sold such articles in quantities to be sold again by wholesale and retail; that he also on one occasion sold unmanufactured goods to the trade in Victoria to be made up into goods. The whole question therefore is whether or not on these facts the defendant is a wholesale dealer and liable to pay a license fee as such.

Mr. Belyea, for the defendant, contended that the defendant being a manufacturer of the articles sold was not liable. I agree with him, that the defendant is not liable to this tax, as a manufacturer. There is no tax imposed on this class of the community, and none can be inferred, as a tax must be imposed in clear and unmistakeable language. I also agree with his contention that one transaction of buying or selling does not make a trader. A trader, whether wholesale or retail, is one who sells to gain his living by such buying and selling, not to gain a profit on one isolated transaction.

The main question is, if a manufacturer sells the product of his labour and skill in wholesale quantities, does he become liable under 55 Vic. Cap. 33, Sec. 204, which says every person carrying on the business of a wholesale, or of a wholesale and retail merchant or trader, is liable to pay a license. Neither the Act nor by-law defines what is included by the term wholesale; and I have therefore to apply the ordinary meaning, which is that wholesale merchants deal with the trade who buy to sell again, while the retail trader deals direct with the consumer. The appellant sold his manufactured goods wholesale to the trade, and therefore he is a wholesale merchant. I see nothing in the Act or by-law to limit the term wholesale business or wholesale merchant to an importer of goods who sells them out in bulk to the trade.

In my opinion, the term is equally applicable to any person who sells in large quantities to the trade goods which he has manufactured and converted from the original article into something else. A cotton spinner converts the raw material into cloth and sells such cloth to the trade. He is a wholesale dealer.

There is no difference in principle between a cotton spinner and a slop manufacturer, if both sell to the trade to be subsequently distributed to the consumer.

I think the judgment appealed from should be confirmed with costs.

*Conviction affirmed.*

**Note : License of "traders."**

The section referred to has been re-enacted in the Municipal Clauses (B.C.) Act, R.S.B.C. 1897, c. 144, s. 171 (ss. 10), as follows: Every municipality shall, in addition to the powers of taxation by law conferred thereon, have the power to issue licenses for the purposes following, and to levy and collect, by means of such licenses, the amounts following:—

(10) From any person carrying on the business of a wholesale, or of a wholesale and retail, *merchant or trader*, not exceeding fifty dollars for every six months.

By the Interpretation Act, R.S.B.C. 1897, c. 1, s. 10 (14), the word "person" shall include any body corporate or politic, or party.

**"Traders" defined.**

Persons who buy the raw material, and work it up into some article of manufacture for the purpose of sale, are held to be traders within the meaning of the bankruptcy laws as well as persons who manufacture articles from materials of their own production. Robson's Bankruptcy Law, 1894, 7th Ed. 130. But a buying without selling or letting for hire, at least without an intention to sell or to let for hire, or *vice versa*, does not constitute a "trading." *Ex parte Gibbs*, 2 Rose 38; *Heaney v. Birch*, 2 Camp. 233.

The buying and selling ought to be in the general way of business, and not in a qualified manner, or only for a special purpose. *Re Cleland*, L.R., 2 Ch. App. 466.

An executor who disposes of his testator's stock-in-trade for the purpose of winding-up his estate, or merely continues the business to the extent that is necessary to complete contracts entered into by the testator, is not a "trader" within the meaning of the English Bankruptcy Act. *Marshall v. Broadhurst*, 1 C. & J. 405; *Edwards v. Grace*, 2 M. & W. 190.

## COURT OF QUEEN'S BENCH, MANITOBA.

BEFORE DUBUC, KILLAM AND BAIN, JJ., SITTING AS A  
COURT OF APPEAL FOR CROWN CASES RESERVED.

## THE QUEEN v. GIBBONS.

*Menaces—Demand with menaces and with intent to steal—  
Threat of prosecution under Liquor License Law—  
Cr. Code 404.*

1. A demand of money from a hotel keeper under threat of prosecution for selling intoxicating liquor in prohibited hours contrary to a Liquor License statute if the demand be not complied with, may constitute the offence under Cr. Code 404, of demanding money with menaces, "with intent to steal the same."
2. For the purpose of proving the "intent to steal" it is sufficient if an inference of such intent is deducible for the acts and conduct of the prisoner as shewn by the evidence.
3. The question of "intent to steal" in a charge of demanding with menaces and with such intent is one entirely for the jury, and cannot be determined as a question of law by the judge.
4. Per *Bain, J.*, where the trial takes place by consent without a jury the finding by the trial judge of such intent should not be interfered with unless there is no evidence thereon which could properly be submitted to a jury.
5. Such a threat of prosecution made to a licensee, who to the knowledge of the prisoner had been previously convicted of an offence under the Liquor License laws and who was therefore liable to a cancellation of his license, as well as to heavy penalties, is such a threat as is calculated to do him harm and as would be likely to affect any man in a sound and healthy state of mind, and any such threat is an illegal menace.

ARGUED : May 14th, 1898.

DECIDED : May 21st, 1898.

RESERVED case. Prisoner was arraigned upon an indictment charging him with having unlawfully demanded for himself, with menaces, from one Bernhardt the sum of \$75 with intent to steal the same. He pleaded not guilty, and was tried before Taylor, C.J., who found him guilty on the evidence which was to the following effect :—

The prosecutor kept a hotel and stated in his evidence that the prisoner came to him and told him he was going

to "pull" him, and wanted some money from him, that he had seen the license inspector and told him all about it, and he wanted \$75 from prosecutor; he said he did not want to take prosecutor to court, but he wanted the money for a ticket and to start business in where he was going; prosecutor said he would see about it. Prisoner went away, but returned and told prosecutor he must have the money to go away with. Prosecutor said to him, "You would not mind taking \$30? \$75 is too much." Prisoner said, No, he must have \$75 and he wanted it in a short time. He returned again and said the other hotel keepers were all satisfied, when prosecutor told him he could not get \$75 from him. In the afternoon prisoner came again and told the prosecutor he did not want to take him to court but he wanted money; he said he was in the bar room on Sunday and bought a flask of whisky, he had also got liquor on election day. The prosecutor subsequently went to the license inspector who had the prisoner arrested. Prosecutor admitted he had previously been convicted of a violation of The Liquor License Act.

Without passing sentence upon the prisoner, Taylor, C.J., remanded him to jail in order to obtain the opinion of the the Court upon the following question :—

"Do the facts established by the evidence taken at said trial constitute a demand of money, with menaces, with intent to steal said money, within the meaning of section 404 of the Criminal Code?"

*H. A. Maclean* for the Crown referred to 9 Geo. 1, c. 22, s. 1; 27 Geo. 2, c. 15; 30 Geo. 2, c. 24; 4 Geo. 4, c. 54, s. 5; and 24 & 25 Vic., c. 96, which consolidated the above and other provisions, and *Reg. v. Jones*, 1 Leach, 164. The idea of "robbery" ran through the Legislation. *Reg. v. Robertson*, L. & C. 483; *Reg. v. Walton*, *id.* 297; *Rex. v. Southerton*, 6 East, 126; *Reg. v. Smith*, 4 Cox, 47; *Reg. v. Tomlinson*, 18 Cox, 75; *Reg. v. McDonald*, 8 Man. R. 491.

No one appeared for the prisoner.



DUBUC, J.—

The question is whether the demand of money by the prisoner from the complainant with menace that, unless it was forthcoming, he would be prosecuted under The Liquor License Act, should be construed as an intent to steal the money, within the meaning of section 404 of the Criminal Code.

The difficulty seems to be whether, had the money been obtained by the prisoner, he could have been convicted of theft. But I do not think it necessary to go so far as to conclusively determine that point. The money might, in certain instances, be handed over under particular circumstances in which the ingredient of theft might not clearly appear. For the purpose of this case, it is sufficient to determine whether an intent to steal is proven, or may be inferred from the action and conduct of the prisoner as shown by the evidence.

The Court is allowed to draw such inference of fact. In *Rex. v. Jones*, 1 Leach, 164, it was held that the crime of robbery may be committed by obtaining money from a man by threatening to charge him with having been guilty of sodomitical practice. The general notion of robbery is that the money or property be obtained with a certain amount of violence; but the Court adopted a liberal and wide interpretation of the offence in considering the obtaining of money by threats as amounting to robbery.

In *Rex. v. Southerton*, 6 East, 126, it was held that the threat must be such as a firm and prudent man may not be expected to resist.

In *Reg. v. Smith*, 4 Cox C. C. 42, Wilde, C.J., adverting to Lord Ellenborough's opinion that the threat must be such an one as is likely to overcome a firm and prudent man, says that would raise questions of very considerable difficulty; and he states his own views as follows: "If the demand and the threat are such as would be likely to affect any man in a sound and healthy state of mind, we do not think it necessary to go further into the question of nervous energy. . . .

Every case of this nature must be judged of by its circumstances alone."

As to "menaces with intent to steal," section 404 of our Criminal Code is substantially the same as 24 & 25 Vic., c. 96, s. 45, (Imp. Stat.) which enacts that "Whosoever shall, with menaces, or by force, demand any property, chattel, money, etc., of any person with intent to steal the same, shall be guilty of felony." In *Reg. v. Walton*, L. & C. 288, decided under that statute, the prisoner had obtained money by threatening to execute a distress warrant which he had no authority to do. The trial Judge directed the jury, as a matter of law, that the conduct of the prisoner constituted a menace within the statute. This was considered a misdirection and the conviction was quashed. The Court held in that case that, where the menaces are not necessarily of a character to excite such alarm as to unsettle the mind and take away that element of free, voluntary action which alone constitutes consent, the offence contemplated by the statute has not been committed. Wilde, B., says at p. 297, that the degree of such alarm may vary in different cases; and he found that a threat or menace to execute a distress warrant is not necessarily of a character to excite such alarm.

The case of *Reg. v. Robertson*, L. & C. 483, was, the following year, decided under the same statute. It was held, in that case, that a threat to imprison a man upon a fictitious charge is a menace within the meaning of the statute.

In the recent case of *Reg. v. Tomlinson*, 18 Cox C. C. 75, 1895, 1 Q. B. 706, the prisoner had threatened the complainant that, unless he let him have 10s., he would let his wife know of his doings with a certain Kate Yende. It was held that the expression "menaces" in section 44 of 24 & 25 Vic., c. 96, includes threats of danger to a person by the making of an accusation of misconduct against him, although the accusation is not of criminal but of immoral conduct. Lord Russell, C.J., says, at p. 77: "It would seem that there was contemplated under the word "menaces" not merely threats of injury to the person or property, but menaces which would involve injury to a third person

intended to be injured, and would induce the person to whom the menaces are addressed to part with money or valuable property. . . . It would be a matter of regret if the Court felt itself compelled to such narrow construction upon the term." The same views were expressed by Wilde, J., who says: "I think that the injury with which a person is threatened should, in order to bring the menace within section 44, receive a liberal interpretation, and that it does not mean an actionable injury only, but includes any injury which is calculated to do a person harm. . . . I have always thought that persons who are practiced upon in this way are not possessed of the ordinary power of resisting. Therefore, I think that a liberal interpretation should be put upon the words."

Such has been the interpretation placed by the courts upon a statutory provision of the same purport as our section 404. In *Reg. v. Robertson*, the complainant was threatened with a fictitious charge said to make him liable to a fine of £1, and 5s. only was demanded. In *Reg. v. Tomlinson*, the injury threatened was not even an actionable injury.

In the present case, as the complainant had already been convicted under The Liquor License Act, the consequences of a second conviction would have been extremely serious to him. The threat, under the circumstances, was certainly "such as would be likely to affect any man in a sound and healthy state of mind," according to the language used by Wilde, C.J., in *Reg. v. Smith*. The prisoner knew it, and the complainant was so far affected that he offered him \$30 to abstain from laying the charge against him.

The intent to steal must be presumed from the circumstances of the case, and it is a question entirely for the jury to determine: *Archbold's Criminal Pleadings*, 484, (Ed. 1893). In this case, the trial was had before the learned Chief Justice who, acting as a jury, has found the prisoner guilty, and his finding is certainly supported by the evidence.

On this ground, and under the above authorities, I think the conviction should stand.

In my opinion, the question submitted to the Court should be answered in the affirmative.

BAIN, J.—

On the case reserved the question the Court has to decide is, practically, Is there any evidence on which it could be left to a jury to say whether the prisoner is guilty of the offence charged in the indictment?

In *Reg. v. McDonald*, 8 Man. R. 493, a case that was decided on the provision of the criminal law that is now found in section 403 of the Criminal Code, the Court held, following *Reg. v. Southerton*, 6 East, 126, that sending a letter threatening a prosecution for a breach of The Liquor License Act unless a sum of money was paid, was not an offence within the section, because the threat was not one that would be likely to overcome a man of an ordinarily firm and prudent mind. But in the recent case of *Reg. v. Tomlinson*, 1895, 1 Q.B. 706, 18 Cox C. C. 75, the Court, I think, took a less restricted view of the meaning to be given to the word "menaces" in this section than had been taken in previous cases; and when a case arises again under section 403, it may be desirable to reconsider the decision in *Reg. v. McDonald*.

But the offence under section 404, under which the indictment here is laid, is a very different one from that under section 403. Under the latter section what is made criminal is the sending a letter demanding money with menaces; and in these cases it must always be a question of law, whether the menaces in the letters sent are such as are contemplated by the statute. Under section 404, however, the offence is demanding money or property with menaces with intent to steal it. An essential element of the offence is the intent to steal; and it seems to me that any menace or threat that comes within the sense of the word menace in its ordinary meaning, proved to have been made with the intent of stealing the thing demanded, would bring the case within the section. And if this be so, then it cannot be determined as a question of law, and without reference to the circumstances of the particular case whether a demand for money with menaces is within the section or not.

*Reg. v. Walton*, L. & C. 288, a case under the corres-

ponding section in the English Act, seems to me to support this view. Wilde, B., who delivered the judgment, thought that a demand for money with intent to steal, if successful, would amount to stealing, and therefore that the menaces must cause such alarm as to unsettle the mind of the person on whom it operates, and to take away from his acts that element of free voluntary action which alone constitutes consent. But, he pointed out, the degree of such alarm may vary in different persons and under different circumstances; and the conviction was quashed, because, as Channell, B., said in *Reg. v. Robertson*, L. & C. 483: "The jury were directed as a matter of law that the menace was within the statute; whereas they ought to have been asked, the threat not being necessarily of a character to excite alarm, whether it was made under such circumstances as to have that effect." In a note in Russell on Crimes, vol. iii, p. 718, Mr. Greaves says that the decision in this case proceeds upon a fallacy, and that it will have to be reconsidered, and that as the whole offence consists in the acts and intent of the accused, it is quite beside that to inquire what their effect on the prosecutor might be. But whether the decision is right or not, it has not been overruled; and Lord Russell, in *Reg. v. Tomlinson*, referring to *Reg. v. Walton*, said the conviction there was quashed because it was not for the Judge to have said as a matter of law that the prisoner's conduct constituted a menace within the meaning of the statute, and that he ought to have told the jury that the question was whether the threat or words used would operate on the mind of a reasonable man so as to deprive him of his free volition and put a compulsion on him to act as he would not act otherwise. It may not be clear whether the direction to the jury should be as to the effect of the menace on the mind of a reasonable man, or as to the effect it might have on the mind of the person to whom it was made, but still the question was one of fact for the jury and not of law for the judge.

It may be that the threat in the present case is not one necessarily of a character to excite alarm, but I think if it was made with the intent to steal the money that was

demanded under the threat, the case is one that comes within the section. I may say I do not think the evidence would justify the inference that there was the intention to steal the money demanded, but that is a question of fact and not of law; and as there is evidence of a demand of money with menaces, I think the question, taking it in the restricted sense I have indicated, should be answered in the affirmative.

KILLAM, J. (dissenting)—

The question which we have to determine is whether there was evidence upon which it could properly be left to a jury to find that the demand was made with menaces and with intent to steal.

In *Reg. v. McDonald*, 8 Man. R. 491, I was not in accord with the restricted construction of the word "menaces" adopted by the majority of the Court. While not positively dissenting, I was inclined to think that a threat of prosecution upon a charge for which such heavy penalties as are provided for in The Liquor License Act may be imposed in case of conviction, ought to be deemed a "menace" within the statute.

It is now claimed that, in view of the decision in *Reg. v. Tomlinson*, 18 Cox C. C. 75, and of the amendment of The Liquor License Act by 56 Vic., c. 18, s. 5, (M. 1893) this Court should reconsider the question.

The amendment of the statute does not appear to me to materially affect the case. The new clause effects a forfeiture of the license where, after one conviction of an offence under sections 143, 144, or 145, upon the information of a license inspector, there is another conviction of an offence under one of those sections, upon the information of an inspector, after a period of three months and within one year from some date not fixed—possibly from the date of the former conviction. Under section 145 there was a possibility of a cancellation of the license upon a second conviction, and under section 205 a third conviction works a forfeiture.

While the prosecutor in this case says that he has been convicted of a violation of the Act, it does not appear that it

was a violation of any of the sections 143, 144 and 145, or that it was obtained upon the information of a license inspector. To state, as he does, that the license inspector had charge of the proceedings, particularly after denying that they were upon an information laid by him, cannot prove that the conviction was had upon the inspector's information. And, besides, the date of the former offence or conviction was not proved. There was, then, nothing to show that the further threatened prosecution necessarily involved a loss of the license, and the consequent suggested loss of the hotel-keeper's business and property.

The enactment in question in *Reg. v. McDonald* was that now found in section 403 of the Criminal Code, which makes no mention of the intent to steal as in section 404. The latter section is similar to that under which *Reg. v. Walton, L. & C.* 288, was decided. There Wilde, B., said that the proper limit to the operation of the section "is to be found in the words 'with intent to steal.'" And he said, "in the cases cited in argument the threatened violence, whether to person or property, was of a character to produce in a reasonable man some degree of alarm or bodily fear. The degree of such alarm may vary in different cases. The essential matter is that it be of a nature to unsettle the mind of the person on whom it operates, and take away from his acts that element of free, voluntary action which alone constitutes consent." A man may pay money to induce a party to refrain from laying a charge against him or from giving information likely to induce the laying of a charge, and he may feel very unwilling to part with his money for that purpose; but this alone does not constitute such an involuntary act that he can be said to give up his money without consent. To warrant the inference of an intent to steal in the party making a demand of money under a threat to lay the charge or give the information, it would seem that it should not be sufficient that he expect the threat to be successful, but that it should be of such a character, or made in such a manner, that he may reasonably expect that it will so unsettle the mind of the party threatened as to take away

the element of voluntary action. There should, I think, be a terror inspired similar to that necessary to constitute robbery, though it need not be a threat of violence to person or property.

In such cases as *Reg. v. Robertson*, L. & C. 483, *Reg. v. Walton*, L. & C. 288, *The Queen v. McGrath*, L.R., 1 C.C.R. 205, and *Reg. v. Hasell*, 11 Cox C. C. 597, there were tricks resorted to for the purpose of deceiving or unsettling the minds of the persons operated upon, as well as threats of violence or actions inspiring actual fear of violence.

Whether the menaces necessary to constitute an offence under section 403 should be of such a character, it is not now important to consider. Neither section 403 nor section 405 expressly includes the element of an intent to steal. In section 405 the threats are to accuse or threaten to accuse of very serious crimes with intent to extort or gain something. Section 403 relates to menaces by letter, which are probably regarded as more heinous because made usually with more deliberation and put in more lasting form.

Evidently Parliament contemplated another element where oral threats of a different or less serious character than those set out in section 405 are used. There was to be something from which it would be proper to infer an express intent to steal, and this is, apparently, not necessarily to be inferred from the intent to extort or obtain.

The question now is, whether there was in this case a menace, with intent to steal. It does not seem to me that the evidence shows a threat of such a character or made in such a manner or under such circumstances as to be likely to produce in the prosecutor the state of mind necessary to making the obtaining of money a theft, and unless the accused could reasonably expect this, he cannot well be said to have had an intent to steal.

In my opinion there was no sufficient ground for an inference of this intent, and the question submitted should be answered in the negative and the conviction quashed.

*Conviction affirmed.*



**Note : 'Intent to steal'—Evidence of.**

In a recent Ontario case a debt collector threatened to have the debtor arrested if the latter did not pay the debt and concurrently demanded certain goods from the debtor, part of which had been supplied by the parties for whom the collector was acting, but upon which they held no lien ; the demand was acquiesced in, according to the complainant's story, through fear caused by the defendant's acts and conduct, and, according to the defendant's story, the goods were taken and were to be held by him merely as security for the debt. There was nothing in the circumstances connected with the debt to make the debtor liable to arrest, nor was it shown that the accused had any reasonable ground for making threats of arrest.

The magistrate found the defendant guilty of demanding the goods with menaces and with intent to steal, but the conviction was quashed by a majority of the Common Pleas Divisional Court (Rose and MacMahon, JJ.) on the ground that there was no evidence of intent to steal. Sir William Meredith, C.J., dissented from the opinion of the majority of the Court. *R. v. Lyon*, 1898, 34 Can. Law. Jour., 470.

The decision in the Ontario case last cited is not reconcilable with the case reported above for on the principle of the latter there was ample evidence from which a judge or jury might draw the inference that Lyons made the demand with intent to steal ; and, if so, the finding of such intent by the magistrate should not have been disturbed.

**'Menace'—Meaning of—Jury.**

See note to *R. v. Collins*, ante 54.

## [SUPREME COURT OF NOVA SCOTIA.]

BEFORE McDONALD, C. J., WEATHERBE, RITCHIE AND  
TOWNSHEND, JJ., GRAHAM, E.J., AND HENRY, J.,  
SITTING AS A COURT OF APPEAL FOR  
CROWN CASES RESERVED.

## THE QUEEN v. DAVIDSON.

*Evidence—Dying declaration—Belief of impending death—  
Subsequent hope of recovery—Irrelevancy of.*

1. On an indictment for murder a dying declaration of the deceased that he was shot in the body and was "going fast," indicates a settled and hopeless consciousness that he was in a dying state and his declaration is admissible in evidence.
2. In deciding the preliminary question as to whether the deceased was under a sense of impending death, so as to allow evidence of his dying declaration to be admitted, the trial judge must have regard to the whole of the surrounding circumstances including the nature and extent of the gun charge and the immediate result of the wound.
3. Per *Weatherbe, J.*—A dying declaration is not admissible if there existed in the mind of the party making it a hope of recovery or a hope of escape from almost immediate death; but if there is a firm, settled expectation by deceased of impending death and no hope of recovery remaining in his mind, the declaration is admissible, although such belief was the result of panic and not well founded.
4. Per *Henry, J.*—The fact, that the person making a dying declaration subsequently entertains a hope of recovery, is irrelevant, except in so far as it may be evidence of his state of mind at the time of the declaration.

ARGUED : November 23, 1897.

DECIDED : January 11, 1898.

Henry Davidson was indicted for the murder of one Charles Bowman by the grand jury of the County of Antigonish, at the last October term of the Supreme Court in that county, and was tried before McDonald, C.J., and a petit jury on the 13th October, 1897, at Antigonish, and found guilty.

On the trial the Crown offered in evidence the dying declaration of the deceased, sworn to by one Benoit, as follows :—

"He said he was shot. I said, 'Do you really say you are shot?' He said, 'I am shot in the body. I am going fast.' I said, 'Can't you take my arm and I will take you

away?' He said, 'I can never walk again.' I said, 'For God's sake who shot you?' He said, 'Henry Davidson shot me. God help him. I hope he will not be hanged for it.'"

The reception of this evidence was objected to by the counsel for the accused on the ground that the evidence did not justify the conclusion that the deceased was conscious he was in a dying state when he made the statements objected to.

The point reserved, as first certified by the trial judge, was whether the declaration objected to, and stated in full in the evidence of Henry Benoit, was properly received. There was no question on the trial as to a similar declaration, testified to by the witness, Mrs. Edward Delory, and the opinion was therefore expressed by the learned trial Judge that if the court decided in the prisoner's favor upon the point reserved, that a new trial should not be granted. The evidence taken on the trial was filed as part of the case reserved.

At the argument the opinion was expressed that there was an ambiguity in the statement of the point reserved, and the case was referred back for amendment to the learned judge, who amended the statement of the question reserved to read as follows :

"Whether the declarations objected to, and stated in full in the evidence of Henry Benoit, should have been rejected on the ground that the evidence did not justify the conclusions arrived at by the trial judge, that the deceased, when he made statements testified to by Benoit, was conscious that he was in a dying state, and that his death was impending."

*C. E. Gregory*, for the prisoner. — Declarations of the deceased were improperly admitted. *Rex v. VanButchell*, 3 C. & P., 631; *Queen v. Crockett*, 4 C. & P., 544; *Queen v. Peel*, 2 F. & F., 21; *Queen v. Nichols*, 6 Cox, 120; *Queen v. Paget*, 7 C. & P., 238; *Rex v. Spilsbury*, 7 C. & P., 187; Taylor on Evidence, (8th Ed.), sec. 716; Greenleaf on Evidence, 211. At the most, the language of the deceased as to who shot him, was only an expression of opinion. The evidence admissible by a dying declaration is only such

evidence as would be admissible if deceased were a witness at the trial. *State v. Williams*, 67 N. Car, 12 ; *Queen v. Sellers*, Carrington's Supp., 233.

*J. W. Longley*, Attorney General, contra. — The court is only at liberty to deal with the case as it is stated by the learned judge. *Queen v. Goddard*, 15 Cox Crim. Cas., 7. I understand the case as reserved to be whether the trial judge was justified in receiving the evidence at the time it was offered, and not whether he was right in receiving it in the light of what happened afterwards. If the party making the declaration believed death to be impending at the time the declaration was made, it is immaterial that he subsequently entertained a hope of recovery. *Regina v. Hubbard*, 14 Cox Crim. Cas., 565.

*C. E. Gregory*, in reply.—*Queen v. Woodcock*, Leach, 503. The judge should have struck out the evidence when another witness made it apparent that the deceased did not believe himself to be dying when the declaration was made. (RITCHIE, J.—But must not the judge consider all the evidence both ways before deciding as to the admissibility of the declaration?) *Queen v. Jenkins*, L.R., C.R., 191. If you can see from the evidence that what was put in as a declaration, was not a dying declaration, and was not evidence, then it is shut out even under the case as now reserved.

HALIFAX, Jan. 11th, 1898.

RITCHIE, J.—

The evidence given in relation to the condition and state of mind of Charles Bowman upon which the statement he made to Henry Benoit, was received in evidence was as follows :—

*Mary Delory*—“ I heard an exclamation, ‘ I am shot.’ I went up to where I heard the exclamation and found Charles Bowman ; he was crawling towards the hen-house ; he asked me if I would go to the priest for him. . . Deceased said, ‘ For God’s sake, go for the priest,’ but he gave me no reason for the request.”

*Henry Benoit* said :—“ When I came up Bowman was

lying down groaning and saying he was shot. He asked me not to leave. I said, 'if you want to see the priest I will have to leave you for a little while.' He said, 'yes, get the priest as soon as possible.' I went to get the priest . . . He asked me was the priest coming. He arrived at the moment. Bowman was then carried into the house into the front room. We then went out. About an hour after I went back to the room, and he was just dying . . . When I got up to deceased he said he was shot. I said, 'Do you really say you are shot?' He said, 'I am shot in the body, I am going fast. 'I said, 'can't you take my arm and I will take you away from here?' He said, 'I can never walk again.'"

In my opinion, this evidence shewed that the deceased was speaking under a sense of impending death, and the statement he then made to Henry Benoit was properly received by the learned Chief Justice.

The prisoner's counsel contended on the argument that the deceased having asked for a doctor, it was evident that he still had some hope of living. I do not think that such a conclusion must necessarily be accepted. But the evidence about sending for the doctor was given by another witness long after the statement to Henry Benoit had been received in evidence, and heard by the jury.

There was no motion made to strike it out as having been improperly received, nor is there any question reserved as to whether or not this statement should have been struck out, when it was afterwards proved that deceased asked for a doctor.

The conviction should be sustained.

TOWNSHEND, J.—

I am of opinion that the learned Chief Justice rightly received in evidence the declaration of the dying man. The preliminary question for him to decide was whether the deceased was, at the moment he made the statements, under the impression and belief that he was dying, with no hope of ultimate recovery. In deciding that question the judge must

have regard to the whole of the surrounding circumstances, and it is for the judge alone to say whether that condition existed at the time. In this case, it seems to me, the circumstances and the condition of the deceased were such as to leave no doubt that he believed, as was in fact the case, that he was then actually dying, when he said, "I am shot in the body. I am going fast. I can never walk again. Henry Davidson shot me. God help him. I hope he will not be hanged for it." The impression upon his mind was unmistakable. It is suggested that the fact of his asking for a doctor indicated a hope. Independently of the fact that this was not in evidence when the statements were received, I am unable to draw the conclusion that it indicated anything different from what he had expressed, especially, when he urged them at the same moment to get the priest as soon as possible, and showed his anxiety for the priest's arrival.

This was the only matter reserved for our consideration, and, as we have no authority to enter on other points sought to be discussed at the argument, I am, therefore, of opinion that the conviction should be confirmed.

WEATHERBE, J.—

This is a question reserved by the learned Chief Justice on the trial of the accused at Antigonish for the murder of Charles Bowman.

Evidence was tendered of a declaration made by the deceased about an hour before his death, from the effect of a gun shot, to one Henry Benoit, that the accused had shot him.

The evidence which was objected to was received, and the question is whether deceased was conscious at the time of the declaration testified to by this witness, that he was in a dying condition.

The objection is, that though at a later period he did become aware of the immediate certainty of death, at the time of the declaration to Benoit, there was nothing to show that he had no hope of ultimate recovery; that there was "no settled hopeless expectation," at that time, of almost

immediate death ; that the evidence does not disclose that there was immediate danger of death at the time in question.

I have very carefully examined the evidence, and, I think, it cannot be said that anyone was present when Henry Benoit reached the deceased after he was shot ; he was the first to come to the place where deceased was, and the declaration first made to Benoit, that the accused, Davidson, shot him, was uttered before the arrival of Mary Delory, and before the deceased had requested either Benoit or Mary Delory, to bring the priest.

Benoit was near at the time he heard the report of the gun. He heard a man cry out that he was shot. He ran up to the man, whom he found to be Bowman, whom he had recently left in the house, close at hand. Bowman walked a few steps and fell. Benoit distinctly says he saw no one there when he got to him. When Benoit reached deceased he was lying down. Benoit, at this stage of his evidence, relates a conversation with the deceased about going for the priest, and goes on to describe what took place after the witness returned from finding someone to send for the priest. Witness then proceeds to speak of the movements of the accused. His attention is, after this, recalled especially to what the deceased said to him when he first reached him :—

“ When I got up to deceased he said he was shot. I said, ‘ do you really say you are shot ? ’ He said, ‘ I am shot in the body. I am going fast. ’ I said, ‘ can you take my arm, and I will take you away from here ? ’ He said, ‘ I can never walk again. ’ I said, ‘ for God’s sake, who shot you ? ’

At this point, objection was taken to the insufficiency of the grounds laid, upon which the declaration was admitted. The witness proceeded :—

“ He (deceased), said, ‘ Henry Davidson shot me. God help him. I hope he will not be hanged for it. I don’t think the man meant it. ’ ”

After the witness reached deceased, and before the declaration of the latter, that Davidson shot him, he expresses the opinion that he is going fast, and that he will never walk again.

At the same time that deceased makes the declaration in contention, he uses language which involves the possibility in his mind of his own death as the result of the wound, for he expresses the hope that Davidson will not be hanged for the act.

In the language of the deceased that he was shot in the body, and was going fast, that he could never walk again, and in the language expressing anxiety that Davidson might not be executed for his death, the only one of these statements involving the consciousness of almost immediate dissolution, perhaps, is the statement that he is sinking fast.

In *Rex v. Crockett*, 4 C.& P., 544, where the surgeon told his patient she would never recover, to which she replied, she hoped he would do what he could for her for the sake of her family, upon which, he again told her there was no chance for her recovery, Mr. Justice Bosanquet struck out the evidence of the declaration, as inadmissible, on the ground that the evidence disclosed a degree of hope in the mind of deceased.

There is nothing in the expression of deceased that he could never walk again, inconsistent with partial recovery from the shooting; nor is the expression of hope that Davidson might not be hanged necessarily more than a suggestion of the possibility of a fatal result from the accident, so that, I think, the question is whether the reply to witnesses' question, whether deceased really said he was shot, that "he was going fast," is to be taken as of itself an expression of what Willes, J., in *Reg. v. Peel*, 2 F.& F., 21, described as "a settled, hopeless, expectation of death."

It was contended that the anxiety of deceased that the priest should be sent for in haste strengthened the contention for the Crown, but the evidence shows, I think, that this desire to have the priest was expressed after the declaration in question.

Benoit reached the wounded man before Mary Delory did, and to each witness deceased made the request that the priest should be brought. The declaration as to the shooting was made to Benoit, on his first arrival—the request to bring



the priest, the last thing before he temporarily left him for that purpose.

In some of the cases, the character of the injury is relied on as showing that the deceased could not have mistaken the immediate necessary result. The surgeon's testimony here shows that death resulted from the puncturing of the abdominal artery by shot from the gun, and there was nothing in the case to indicate that any feeling of the danger of death would be created by the state of the abdomen until the near approach of death.

It is admitted that deceased, in this case, was contemplating the danger of death from the first, but the contention is that the Crown must show something further, and I have no doubt this contention is correct.

An exclamation by one receiving a gun-shot wound may disclose nothing more than a nervous, anxious, or hysterical state of mind. The nature and extent of the charge, and the distance are to be considered, as also the immediate result of the wound. The mangling of the body, the sudden effusion of blood, and clear manifestations of suffering or approaching collapse, are all to be considered.

In many cases of gun-shot wounds there is slow, and in many cases, complete recovery. Possibly, and perhaps the probability is that, the exclamation of deceased that he was going fast arose from the alarm created by the consciousness that he had received in his abdomen part or the whole of the charge from the gun, and nothing more.

Now, if there existed a hope of recovery, or a hope of escape from almost immediate death, the declaration, it appears is inadmissible according to the law of evidence.

Is it sufficient that "mere expression of alarm, however great, at the prospect of death from a gun-shot wound, the condition of which is entirely unknown, immediately after the discharge, shall form a ground work of a declaration?"

It is, no doubt, important that the rule for admitting declarations of deceased persons against the accused should not be relaxed. It might be considered dangerous to hold that the sudden exclamation alone, such as, "I'm a dead

man," or "I shall never survive," immediately upon receiving a wound which eventually results in death, should be taken to indicate the consciousness of "almost immediate dissolution."

I think the authorities would hardly support a contention that intelligence and calm judgement should enter, as an element, into the opinion of the declarant as to his approaching dissolution to justify the admission of a "dying declaration." On the contrary, if the belief is the result of panic, provided there is a firm, settled expectation of death, and no hope remaining, the declaration will be admitted in evidence.

Though the point has not been discussed in any of the cases, it seems, in some of them, to have been taken for granted that the statement of deceased, as to his condition, is to be regarded as the measure of his conviction, as in *Reg. v. Peel*, where there were fair hopes of recovery at the time of the declaration, according to the medical witness, though, in many cases, the excitement of the occasion would cause much exaggeration.

We are dealing with a question of fact which the learned Chief Justice had before him, and which, perhaps, he might have decided either way on the objection taken to the admission of the declaration of the deceased.

I am inclined to the view taken by him on the trial, that the statement of deceased that he was "going fast," indicated a settled and hopeless consciousness that his end was approaching, and, therefore, that the ruling cannot be disturbed.

GRAHAM, E. J.—

The defendant was found guilty of murder, and there has been a case reserved for the judges as to whether a dying declaration was properly received in evidence.

On the hearing before us it was contended that a statement purporting to be a dying declaration was improperly received in evidence, upon two grounds,—(1.) That a foundation was not laid for its reception, because, when the statement was made by the deceased, there was not a settled expectation of

immediate dissolution. (2.) The statement was a statement of an opinion that the accused shot him and not of fact. The shot having been discharged through a closed panel door, it was not a fact to which the deceased could testify.

In my opinion, although the deceased did speak of sending for a doctor, which was consistent with the idea that he thought there was hope of his recovery, there was evidence the other way, such as that he was going fast. The learned trial judge having passed on it, we cannot say it ought to be reversed.

The second ground, that the statement was not evidence, raised the question whether this point was reserved in the case.

The objection noted is a general one. The note asking to have the case reserved is as follows :—

“Mr. Gregory, moves to reserve the question of the admissibility of the evidence of Henry Benoit, as to the statement of Bowman, when dying, that Davidson had shot him. I reserve the point, though of opinion that if the court decide in his favor, in view of Mrs. Delory's evidence, on a similar statement by Bowman, and which is not objected to, it would not grant a new trial.”

In the case it is thus stated :—

“The point reserved is whether the declaration objected to, and stated in full in the evidence of Henry Benoit, was properly received.”

But there is a recital which, it was contended, controlled the generality of this reservation, namely :—

“The reception of this evidence was objected to by the counsel for the accused, on the ground that the evidence did not justify the conclusion that the deceased was conscious he was in a dying state, when he made the statements objected to.”

There being a question open to argument, it was referred back to the trial judge to amend. The amendment made excluded the point.

In the meantime an application was made to him to reserve that ground, in case it was not covered, that, sentence

not having been passed, it was competent for him now to reserve it. This was not acceded to, and the Attorney General did not accede to an appeal.

This, in my opinion, precludes us from considering whether the statement was receivable or not.

HENRY, J.—

The evidence of the circumstances under which the statement of the deceased was made, is, in my opinion, amply sufficient to justify the reception of that statement as a dying declaration.

His own statements, other than the incriminating statement, namely, "I am shot in the body," "I can never walk again," "I am going fast," "I hope he will not be hanged for it," constitute cogent proof of the state of his mind as to his condition. His asking for the priest, the nature and locality of the wound, and its rapidly succeeding result, are facts which justify the conclusion that the statement was made under a sense of impending death.

That afterwards he asked for a doctor, which fact was given in evidence after the declaration was received is immaterial, and would not have involved its exclusion, even if proved previously to the reception of the declaration. Even if it were correct to hold that a request by a wounded person to send for a doctor is necessarily inconsistent with the idea that all hope of life is gone, that would not affect the present case, which is a case where it appears that the belief of the declarant, when making the declaration, was that his life was going fast.

It is the apprehension of his condition, at the time of the declaration, which, when it is followed by death, makes the statement of a dying person admissible. That being so, the fact that such a person subsequently entertains a hope of recovery is irrelevant, except in so far as it may be evidence of his state of mind at the time of the declaration. See *Rex v. Hubbard*, 14 Cox, 565.

**Notes :—Dying Declaration—Admissibility—Limitations and requisites.**

The principle upon which dying declarations are admitted as evidence is stated by Eyre, C.B., in the case of *R. v. Woodcock*, 1 Leach C.C., 502, as follows :—

“The general principle on which this species of evidence is admitted is that they are declarations made in extremity, when the party is at the point of death, and when every hope of this world is gone, when every motive to falsehood is silenced, and the mind is induced by the most powerful consideration to speak the truth ; a situation so solemn and so awful is considered by the law as creating an obligation equal to that which is imposed by a positive oath administered in a court of justice.”

A dying declaration is only admissible in criminal cases, and then only in cases of murder or manslaughter. In *R. v. Mead*, 2 B. & C. 605, the defendant having been convicted of perjury, a rule nisi for a new trial was obtained. While that was pending the defendant shot the prosecutor, and on showing cause against the rule an affidavit was tendered of the dying declaration of the latter as to the transaction out of which the prosecution for perjury arose. It was held that it could not be read, for that dying declarations are admissible only where the death is the subject of the charge, and the circumstances of the death the subject of the declaration. But the dying declaration of a person was admitted in a case in which the prisoner was being tried, not for murdering the declarant, but another person, by the administration of poison, but in the perpetration of that act he had also inadvertently poisoned the declarant. In that case the court held that the same act caused the death of one as the other, and that, it being all one transaction, the evidence was admissible. *R. v. Baker*, 2 M. & Rob. 53.

Where the deceased person stated at the time of being wounded that he could not live much longer and that he was bound to die, such was held sufficient evidence of a belief of impending death so as to make his dying declaration admissible testimony. *State v. Ashworth*, 1898, 23 Sou. Rep. 270.

**Notes : (Continued).**

The fact of a person having received extreme unction according to the rites of the Roman Catholic Church is some evidence that she thought herself to be in a dying state, *Carver v. U.S.*, 1897, 17 Sup. Ct. Rep. (U.S.), 228 ; *Minton's Case*, cited in *R. v. Howell*, 1 Denison Crown Cases 1 ; and so also is the rejection by a dying man belonging to the Roman Catholic faith, of an offer to bring him a priest, some evidence to show that he did not think himself *in articulo mortis*. *R. v. Howell*, *supra*.

***Impeachment and Contradiction of Dying Declarations.***

Such declarations being necessarily *ex parte*, the prisoner is entitled to the benefit of any advantage he may have lost by the want of an opportunity for cross-examination. *R. v. Ashton*, 2 Lewin Crown Cas. 147. So it has recently been held by the Supreme Court of the United States that it is error to refuse to permit the defendant to prove by witnesses that the deceased made statements to them in apparent contradiction of her dying declaration, and tending to show that defendant did not shoot her intentionally. Whether these statements were admissible as dying declarations or not is immaterial, since they were admissible as tending to impeach the declaration of the deceased, which had already been admitted. *Carver v. U.S.*, 1897, 17 Sup. Ct. Rep. 228. A dying declaration by no means imports absolute verity. The history of criminal trials is replete with instances where witnesses, even in the agonies of death, have, through malice, misapprehension, or weakness of mind, made declarations that were inconsistent with the actual facts ; and it would be a great hardship to the defendant, who is deprived of the benefit of a cross-examination, to hold that he could not explain them. Dying declarations are a marked exception to the general rule that hearsay testimony is not admissible, and are received from the necessities of the case, and to prevent an entire failure of justice, as it frequently happens that no other witnesses to the homicide are present. They may, however, be inad-

**Notes :** (*Continued*).

missible by reason of the extreme youth of the declarant (*R. v. Pike*, 3 Car. & P. 598), or by reason of any other fact which would make him incompetent as an ordinary witness. They are only received when the court is satisfied that the witness was fully aware of the fact that his recovery was impossible, and in this particular the requirement of the law is very stringent. They may be contradicted in the same manner as other testimony, and may be discredited by proof that the character of the deceased was bad, or that he did not believe in a future state of reward or punishment. *Carver v. U.S.*, supra ; *State v. Elliott*, 45 Iowa, 486 ; *Com. v. Cooper*, 5 Allen, 495 ; *Goodall v. State*, 1 Or. 333 ; *Tracy v. People*, 97 Ill. 101 ; *Hill v. State*, 64 Miss. 431.

## [SUPREME COURT OF BRITISH COLUMBIA.]

BEFORE DRAKE, J.

## Re PLUNKETT.

*Certiorari—Application for—Six days' notice to justices—  
Substitution of fresh warrant of commitment.*

1. The Imperial Statute 13 Geo. II. c. 8, s. 5 is in force in British Columbia as well as in Ontario, and six days previous notice of the motion for a certiorari must be given to the justices.
2. A rule nisi for a certiorari made returnable six days or more after service thereof is not a sufficient compliance with the statute.
3. The justices may return an amended or fresh warrant of commitment with the writ of certiorari and if it be sufficient the court will not enquire into the validity of a previous warrant, upon which the prisoner was held, which was bad for not following the conviction or disclosing any offence.
4. Costs were refused to the justices as against the defendant in such case as the application was justifiable at the time it was launched.

DECIDED : March 1, 1895.

Rule nisi by defendant for a *certiorari* to bring up a conviction for larceny, and all causes of the prisoner's detention, and also for a writ of *habeas corpus* to bring up and discharge the prisoner from custody on the ground that there was no sufficient warrant for his detention and that the prisoner be discharged without the writ actually issuing, and that the presence of the prisoner upon the return of the rule be dispensed with.

The rule nisi had been served upon the convicting justices more than six days before the date of its return, but six days' notice of intention to apply for *certiorari* had not been served on them as required by 13 Geo. II. Cap. 8, Section 5.

The original warrant of commitment upon which the prisoner was held, at the time of the service of the rule nisi was admittedly bad for not following the conviction or disclosing any offence ; but after the service of the rule, a good warrant was drawn up and duly signed by one of the convicting justices and was substituted and brought in on the return of the rule nisi.



*Robert Cassidy*, for the convicting justices, shewed cause against the rule nisi. The Statute 13 Geo. II. Cap. 8, Sec. 5, is in force in this province. It has been held to be in force in Ontario, *Regina v. Peterman*, 23 U.C.Q.B. 516; *Regina v. Munro*, 24 U.C.Q.B. 44. The service of the rule to show cause, though more than six days be given upon it, is not a sufficient compliance with the act. Paley on Convictions, 6th Ed. 438; *Regina v. Justices of Glamorgan*, 5 T.R. 279. Convicting justices have a right to substitute and return a good in place of a bad warrant to a writ of *certiorari*. *Regina v. Richards*, 5 Q.B. 926; *Lindsay v. Leigh*, 11 Q.B. 455, *ex parte Cross*, 2 H. & N. 354; *Massey v. Johnson*, 12 East, 82.

*J. P. Walls contra.*

VICTORIA, B.C., March 1, 1895.

DRAKE, J.—

I must hold upon the authorities cited that the Statute 13 Geo. II., Cap. 8, Sec. 5, is in force in this province, and that the service of the rule nisi upon the convicting justices though more than six days before the date of its return was not a sufficient compliance with the statute. The motion for a *certiorari* will therefore be dismissed with costs. As far as this objection goes, a fresh application might be made by the prisoner. It appears however that the only substantial defect in the proceedings struck at by the motion is the insufficiency of the warrant of commitment. The justices have since the service of the rule upon them, substituted and returned a good warrant which is supported by the conviction. "If a good warrant of commitment be returned, the Court will not enquire into the validity of a previous document under which in fact the prisoner was committed." Paley on Convictions, 6th Ed. 348. The motion for a writ of *habeas corpus* and discharge of the prisoner will therefore be dismissed, but without costs, as it was justified at the time it was launched.

*Rule nisi discharged.*

**Notes :** *Application for certiorari.—Notice to magistrate.*

It is necessary to serve the convicting magistrate with notice of the application for a certiorari, because he is exposed to an action if the conviction should be quashed; the convicting magistrate must be notified although the conviction has been affirmed on appeal to the Quarter Sessions, to remove the conviction from which court the certiorari is sought, and although the presiding justices of the Sessions as well as the complainant have been served. *R. v. Peterman*, 1864, 23 U.C.R. 516.

*Limitation of time for application.*

Application for the *certiorari* must be made within six calendar months next after the conviction. Imp. Stat. 1739-40, 13 Geo. II. c. 18, s. 5, *infra*.

*Six days' notice required.*

By Imp. Act, 1739-40, 13 Geo. II. c. 18 s. 5, it is provided as follows :

5. And for the better preventing vexatious delays and expense, occasioned by the suing forth writs of certiorari, for the removal of convictions, judgments orders and other proceedings before justices of the peace, be it further enacted by the authority aforesaid that from and after the twenty-fourth day of June, which shall be in the year of our Lord, one thousand seven hundred and forty, no writ of certiorari shall be granted, issued forth or allowed to remove any conviction, judgment order or other proceedings had or made by or before any justice or justices of the peace of any county, city, borough, town-corporate, or liberty, or the respective general or quarter-sessions thereof, unless such certiorari be moved or applied for within *six calendar months* next after such conviction, judgment, order or other proceedings shall be so had or made, and unless it be duly proved upon oath that the said party or parties suing for the same hath or have given *six days' notice* thereof in writing to the justice or justices, or to two of them (if so many there be) by and before whom such conviction, judgment, order, or other proceeding

**Notes : (Continued).**

shall be so had or made, to the end that such justice or justices or the parties therein concerned, may show cause, if he or they shall so think fit, against the issuing or granting such certiorari.

*Notice a condition precedent.*

The effect of the Statute 13 Geo. II. c. 18 s. 5, is to imperatively require that six days' notice shall be given, and to make the giving of it a *condition precedent* to the issuing of the writ, and the convicting justices are not driven to make an independent application to quash the certiorari for the want of such notice, but can set up the defect in answer to the rule nisi obtained by the defendant to quash the conviction. *R. v. McAllan*, 1880, 45 U.C.R. 402, 406.

*Objection open on subsequent proceedings.*

There is no inflexible rule that a certiorari must stand unless specially moved against, and the justices who have not received proper notice of the application should not be driven to the extra expense of an independent motion to quash, the absence of the statutable notice being a "most substantial defect." Per Hagarty, C.J., *R. v. McAllan*, 1880, 45 U.C.R. 402, 408.

*Waiver of statutory notice.*

The magistrate may however waive the right to take the objection and if a preliminary fact affirmed on one side is intended to be denied by the other, the objection should be taken promptly. It was therefore held, where a certiorari had issued to a court of sessions on an affidavit of due service of notice on two magistrates sworn to have been present at the making of the order, and a whole term had elapsed after the making of the return to the certiorari without objection being made, that it was then too late to bring in proof on an application to quash the certiorari, that one of the magistrates so served was not in fact present at the time of the making of the order. *R. v. Inhabitants of Basingstoke*, 1849, 19 L.J.

**Notes : (Continued.)**

M.C. 28. This case was approved and followed in *R. v. Whitaker*, 1894, 24 Ont. R. 437 by Galt, C.J. and Rose, J. In the latter case the magistrate had assented to the request to postpone the date to be fixed by the conviction for payment of the fine imposed so as to enable an application for certiorari to be made meanwhile, and had pursuant to such assent fixed a date within six days from the conviction ; he had also made a return to the writ, and his counsel attended court to show cause to the order nisi, when however the case was not reached and stood over till the following term, and a copy of the affidavit on which the certiorari had been granted was demanded by and served upon his solicitor, without objection being raised in any of such proceedings to the regularity of the certiorari. Upon these facts the court held that an objection that the statutory six days' notice of the application for the writ of certiorari had not been given, was made too late when raised for the first time at the sittings to which the case had stood over.

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[SUPREME COURT OF THE NORTH WEST  
TERRITORIES.]

BEFORE RICHARDSON, J., WETMORE, J., McGUIRE, J., AND  
SCOTT, J.

**THE QUEEN v. BANKS.**

*Municipal by-law—Proof of—Transient traders—Conviction—  
Costs of quashing.*

1. Proof of a municipal by-law cannot be made by affidavit on a prosecution for an offence thereunder.
2. In a prosecution under a by-law for licensing transient traders and other persons who occupy premises in the municipality for temporary periods, it is necessary that the conviction should state that the defendant was a transient trader or other person occupying premises, etc., in the terms of the by-law.
3. A conviction for "carrying on the business of a sewing machine agent, without first having obtained a license so to do, contrary to the by-law" is not in compliance with such rule and is therefore bad.
4. Costs of quashing a conviction by *certiorari* proceedings are not awarded except in cases of misconduct of the informant or of the Justice.

DECIDED : December 15, 1895.

Motion for a *certiorari* for the purpose of quashing the conviction of the defendant who was a sewing machine agent and was convicted for carrying on his calling without a license, contrary to the provisions of a by-law of the municipality of Macleod.

Neither the original by-law nor a copy was put in as evidence of its contents.

The arguments and the cases cited are set out in the judgment.

*MacCaul, Q.C.*, for the motion.

*C. F. Harris* contra.

REGINA, N.W.T., December, 15th, 1895.

The judgment of the Court was delivered by SCOTT, J.

SCOTT, J.—

This was a motion for a writ of *certiorari* to remove into this court a conviction made at Macleod on 24th December,

1894, whereby the said Charles Henry Banks was convicted "for that he the said Charles Henry Banks, whose name had not been entered on the last revised assessment roll of the municipality of the town of Macleod on the 22nd day of September, 1894, within said municipality, was a sewing machine agent, carrying on his business, occupation and calling as such sewing machine agent without first having obtained a license so to do, contrary to the provisions of by-law No. 25 of the town of Macleod," and to quash such conviction upon its return under the writ of *certiorari*.

Several objections were taken to the conviction, only one of which it is necessary to consider, namely, that the alleged by-law is ultra vires of the municipality.

It appears from the affidavits filed that the original by-law under which the conviction was made was produced at the hearing before the Justice, but that the same was not nor was any copy thereof, put in or filed as evidence of its contents. Counsel for the defendant sought to prove the by-law by affidavit, but the Counsel for the informant objected to the proof as being insufficient, and after due consideration I am obliged to sustain the objection.

It follows, therefore, that so far as this application is concerned, the only means of ascertaining the provisions of the by-law is by reference to the information and conviction copies of which have been filed.

Counsel for the informant admitted during the argument that the by-law was passed under the provisions of sub-section 31, section 68 of "The Municipal Ordinance," being chapter 8 of "The Revised Ordinances," which is as follows :

68. The council of every municipality may pass by-laws for . . . .

(31) Licensing, regulating, and governing transient traders and other persons who occupy premises in the municipality for temporary periods and whose names have not been duly entered on the assessment roll in respect of income or personal property for the then current year, and for fixing the sum to be paid for a license for exercising any

or all such callings within the municipality, and the time the license shall be in force."

The offence stated in the conviction is not one which can be created by a by-law passed under the provisions of the sub-section referred to, because it is not alleged that the defendant was a transient trader or other person occupying premises in the municipality for a temporary period, and I am therefore of the opinion that the conviction should be quashed.

As to the costs of the application the counsel for the defendant cited a number of cases both in England and Ontario in which costs had been awarded to the defendant in similar cases. In England the law now appears to be well settled that the court has no jurisdiction to award costs in such cases (see *Regina v. Whitchurch*, 7 Q.B.D., 534, *Re Mills Estate*, 34 C.D., 24, and *Regina v. Parlby*, 6 Times L.R., 36). Of the Ontario cases cited, *Regina v. Coutts*, 5 Ont. R., 644, shows that the usual rule is not to award costs, and as to the other cases cited in which costs were awarded, they are shown to have been awarded by reason of some misconduct on the part of the Justice or informant. It is not suggested that there is any such misconduct in this case.

The rule will therefore go for the issue of a writ of *certiorari* and for the quashing of the conviction upon its return thereunder without further order. There will be no costs. The rule will provide that no action shall be brought against the justice who made the conviction.

RICHARDSON, J., WETMORE, J. and MCGUIRE, J., concurred.

*Conviction quashed without costs.*

## [HIGH COURT OF JUSTICE, ONTARIO.]

BEFORE BOYD, C., ROBERTSON AND MEREDITH, JJ.,  
SITTING AS A COURT OF APPEAL FOR CROWN  
CASES RESERVED.

## THE QUEEN v. HAMMOND.

*Former depositions of accused—Admissibility—Coroner's Inquest*  
*—Canada Evidence Act.—Criminating answers—*  
*Proof of motive—Res gestæ.*

1. A witness before a Coroner's Court is compelled under the Canada Evidence Act to answer incriminating questions, such court being a criminal court and a court of record, and proceedings before the coroner are within the jurisdiction of the Federal Parliament, although no one is there charged with the offence of causing the death of the deceased.
2. Under the Canada Evidence Act, 56 Vic., c. 31, s. 5, prior to the amendment of 1898, it was not necessary first to object to answer an incriminating question, in order to entitle the witness to the benefit of the provision making the incriminating answer inadmissible on any subsequent criminal proceedings against him, other than for perjury.
3. To prove the alleged motive of securing life insurance moneys, in a trial for murder, evidence is properly admissible, as a part of the *res gestæ* of all applications for insurance made practically at the same time and forming parts of one transaction, although some of the applications were refused and no insurance effected thereupon.
4. The decision of a Court of Appeal for Crown Cases Reserved is not binding upon other judges of co-ordinate jurisdiction, sitting as such court even in the same Province.
5. A witness at a Coroner's inquest, who is sent for by the Coroner and returns with the constable, acting as the Coroner's messenger, and who is bound in law to answer incriminating questions whether or not he objects, is none the less giving evidence under compulsion because he expresses before the Coroner a wish to give his evidence, and such evidence is not a voluntary confession or admission.

ARGUED : January 25, 1898.

DECIDED : February 8, 1898.

This was a Crown case reserved by Meredith, J., before whom the prisoner, William James Hammond, was tried and convicted at the Court of Oyer and Terminer held in and for the Provisional Judicial District of Muskoka and Parry Sound, at Bracebridge, on November 30th, 1897, and four following days, on an indictment which charged him with the murder of his wife Katie Hammond.



During the trial the depositions of the prisoner taken under the circumstances detailed in the testimony of the coroner, and sufficiently stated in the judgments, were tendered as evidence for the prosecution, objected to by the defence, and admitted as evidence by the learned judge, who considered that he was bound by the case of *Regina v. Williams*, 1897, 28 O.R. 583, but reserved for the opinion of a Divisional Court, composed of Judges of the Chancery Division, the question—"Whether those depositions taken under those circumstances were properly admitted as evidence?"

Further, at the trial, evidence was tendered for the Crown of applications and attempts by the prisoner to obtain further insurance upon the life of his wife, which were refused or otherwise not effected, which evidence was objected to, but admitted, and the question was reserved—"Whether such evidence was properly admitted, and, if not, whether by reason of the admission of it, the prisoner is entitled to a new trial?"

The case was argued on January 25th, 1898, before Boyd, C., Robertson and Meredith, JJ.

*E. F. B. Johnston, Q. C.*, for the prisoner, contended that sec. 5 of the Canada Evidence Act, 1893, 56 Vict., ch. 31, had changed the whole policy of the law; that now, in the interests of justice, all facts must be got at and no witness may shield himself, but he is protected as to any information so given: Russell on Crimes, 6th ed., vol. 3, pp. 512, 520; *Regina v. Scott*, 1856, D. & B. 47; *Wakley v. Cooke*, 1849, 4 Exch. 511; that though the prisoner had given the evidence voluntarily, still under the enactment in question he would have had to give it; that the coroner's court is a criminal court, and a court of record: Boys on Coroners, p. 2; *Garner v. Coleman*, 1868, 19 U.C.C.P., at p. 108; Lewis' Blackstone, vol. 4, p. 274, sec. 11; Archbold on Criminal Pleading and Evidence, 21st ed. p. 132, though the finding of a coroner is no longer equivalent to the finding of a true bill by a grand jury: Criminal Code, 55-56 Vict. ch. 29, secs. 568, 642; that

it could not have been necessary for the prisoner to take a meaningless objection to giving his evidence, in order to come within the protection of the section ; that " no person " in the section means " no witness," and " so given " means " given under such circumstances"; and that in *Regina v. Williams*, 1897, 28 O.R. 583, the Divisional Court were seeking to amend the statute : *Regina v. Hendershott and Weller*, 1895, 26 O.R. 678. As to the second branch of the case, he contended that it is only when the prior acts sought to be given in evidence are acts of crime, that the courts allow them to be proved as leading up to the act in question ; that when there are acts connected together shewing a system, which system leads up to death, then the evidence is relevant as part of the *res gestæ* ; that none of the evidence of lapsed policies could be evidence of intent, for they shewed no motive existing at the time of the killing.

*J. R. Cartwright, Q.C.*, for the Crown, contended that the insurance existing at the time of death shewed the motive for the killing, but the abortive applications shewed the motive for which that insurance was put on—the plan and the scheme. On the other point, he contended that a coroner's court was not a criminal court within the meaning of the Canada Evidence Act, 1893, 56 Vict. ch. 31 ; that the Criminal Code had altered its character, and that this being so, there was no question as to the admissibility of the evidence ; that if it were a criminal court, *Regina v. Williams*, 1897, 28 O. R. 583, bound this Court ; that in construing the section the Legislature must not be supposed to have interfered with the law further than necessary to deal with some evil sought to be remedied by the Act ; that the section in question implied that the man had asked to be excused from giving his evidence, as was always necessary if he was to be protected ; that if the Act had meant that none of the evidence given should be admissible, it would have said so as in R.S.C. ch. 150, sec. 8, sub-sec. 2, and ch. 164, sec. 97, sub-sec. 3 ; that " so given " means " given under this section ": Wilberforce on Statute Law, p. 20 ; Maxwell on the Interpretation of

Statutes, 3rd ed., p. 113; Hardcastle on the Interpretation of Statutes, 2nd ed., p. 322; *Regina v. Buttle*, 1870, L.R. 1 C.C.R. 248; *Regina v. Sloggett*, 1856, Dears. C. C. 656; *Regina v. Erdheim*, 1896, 2 Q.B. 260, 3 Mans. B.C. 142.

*Johnston* in reply.

TORONTO, February 8th, 1898.

BOYD, C.—

The answer to the first question reserved depends upon the proper construction and meaning of sec. 5 of the Canada Evidence Act, 1893, 56 Vict. ch. 31 (D.). It reads thus: "No person shall be excused from answering any question upon the ground that the answer to such question may tend to criminate him \* \* provided, however, that no evidence so given shall be used or receivable in evidence against such person in any criminal proceeding thereafter instituted against him other than a prosecution for perjury in giving such evidence."

Upon the investigation of crime prior to this statute, a witness brought before the coroner was not obliged to answer any question that tended to self-incrimination. The practice of the courts founded upon the common law was embodied in the maxim "*nemo tenetur seipsum accusare*." The witness had in his own hands the power of self-protection by objecting to answer on that ground, and then it fell to be judicially determined whether the circumstances justified his silence. If the ruling was in his favour the question remained unanswered. If it was against him, the witness was ordered to answer. If, however, it turned out that the ruling was wrong and that the answer when given did tend to criminate him, the mischief was repaired by holding that the testimony was the result of improper and illegal compulsion and could not be used against the witness. *Regina v. Garbett*, 1847, 1 Den. C.C. 236, and more fully, 1847, 2 C. & K. 474, and *Regina v. Coote*, 1873, L.R. 4 P.C. 599. Then it was further held that if the witness elected to waive his privilege by answering without claiming it, when he might lawfully do so — he was deemed to have

answered voluntarily and the evidence could afterwards be read against him: *Regina v. Sloggett*, 1856, 7 Cox C. C., at p. 144.

The general state of the law before this Act was as stated by Willes, J., in *In re Fernandes*, 1861, 10 C.B.N.S., at p. 39: "Every person \* \* may be called upon and is bound to give evidence to the best of his knowledge upon any questions of fact material and relevant to an issue tried in any of the Queen's Courts, unless he can show some exception in his favour, such, for instance, as that \* \* to answer might put him in peril of criminal proceedings."

There was and is in England a noteworthy exception created by statute in the case of bankruptcy proceedings.

In these statutes sanction is given to incriminating interrogatories. And it is decided that when the law allows such questions to be put and the witness is thereby compelled to speak, such compulsion is legal and the answers are (in the absence of any clause of immunity) admissible for all purposes thereafter: *Regina v. Scott*, 1856, D. & B. 47. That result has been deprecated as harsh and impolitic: *Regina v. Robinson*, 1867, L. R. 1 C. C. R. 80; *In re Solicitor*, 1890, 25 Q. B. D., at p. 25. Perhaps for some such reason the Canadian Parliament has expressly provided that evidence given by the witness under the section shall not be used against him. The former privilege of silence is thus abolished and as a substitute the disclosure when made becomes privileged.

And this, broadly speaking, was what was ruled by the court in *Regina v. Hendershott*, 1895, 26 O.R. 678; but this case was afterwards overruled by the Divisional Court in *Regina v. Williams*. In view of these diverse holdings and sittings as a court of final appeal, it is our duty to examine the matter independently; see *In re Larkin*, 1841, 4 Ir. L.R. 46; and *Haight v. McInnis*, 1862, 11 U.C.C.P. 518, 523.

*Regina v. Williams* decides that evidence given before the coroner and jury by the witness may be afterwards read against him unless he has before answering claimed privilege from the court and been ordered to answer. That precisely is the point here arising for determination.

This defendant was brought before the coroner by a constable as a witness—whether under subpoena or not does not accurately appear. He was “cautioned” by the coroner that “it was not necessary to be examined under oath without he wished to be so, and that any evidence taken might be used against him.” He then said he wished to give evidence and was sworn in the usual way and was asked questions by the county crown attorney and the coroner and perhaps by the jury, in response to which the evidence, now under objection, was given. That evidence was used to fix criminal liability upon him and it is relevant for that purpose. This witness did not make a voluntary confession or an officious statement; what he said was when being examined under oath. He was speaking under what was called the “lawful duress of an oath” in *Scott's* case (see also *Rex v. Britton*, 1833, 1 M. & Rob., at p. 299), and was also giving evidence under the compulsion of the statute. He was in every sense, therefore, bound to speak the truth and the whole truth, in response to the officers of the court. True, he did not claim the privilege of silence as to any question. Did this omission free his testimony from the protection of the statute so that it can be used against him in this trial? The Divisional Court says: “Yes, because the intent is to exclude evidence given under compulsion and evidence is given voluntarily when the party giving it may object to giving it and does not do so.” And further it is said in the judgment (28 O.R., at p. 587) the words in the section ‘so given’ “apply only to evidence given by a person who has claimed to be excused from answering upon the ground that his answer may tend to criminate him, etc., and not to evidence volunteered or given without such claim or privilege.” The point of this decision then is that evidence given without claim of privilege is to be treated as voluntary evidence,—which, like a voluntary confession, may be used always against the person making it.

Before the Act, this claim of privilege stood for something, so that it might be lawfully and effectively used as a protection. Now it is a mere futile form; to claim it cannot help the witness and the failure to claim it ought not to hurt him.

Once submitted to the court that it might be judicially determined whether it should or should not be granted; *Lamb v. Munster*, 1882, 10 Q.B.D. 110; there is now no power to consider it, for the statute forbids.

In fact and in law the witness under oath, answering questions pursuant to the statute, does not speak voluntarily, he is under legal compulsion throughout. Surely, therefore, the doctrine of compulsion propounded in the older authorities and adapted to present practice in *Regina v. Williams*, is without pertinence or significance.

If the statute takes away the privilege and takes away the discretionary function of the court it remains that the witness is bound to answer and is protected in what he says.

So far as the preliminaries to this examination are concerned, the caution of the coroner to the witness was not well advised. The rule under the former law is laid down in *Jervis on Coroners*, thus, that a coroner has no right to refuse to examine persons upon oath at an inquest merely on the ground that their evidence might criminate themselves; the proper course is to tell him (the witness) "that he is not bound to criminate himself and to allow him to make any statement he may wish": 5th ed., p. 35, citing *Wakley v. Cooke*, 1849, 4 Exch. 511. That will require to be modified under the Canada Act, but not in the way that it appeared in the coroner's evidence at the trial.

But apart from caution from the Bench at the critical point, which was practically the rule in criminal cases before this Act; *Fisher v. Ronalds*, 12 C. B. 763; *Regina v. Garbett*, 1847, 1 Den. C.C., at p. 248, in argument, and 2 C. & K., at p. 485, per Wilde, C.J.; the witness is presumed to know the law and so here he is to be presumed to know the terms of the statute: *Regina v. Coote*, 1873, L. R. 4 P. C. 599. In the Coote case he knew that if he was to claim privilege he might avoid answering, and in the present case the witness in contemplation of law knew (as did the coroner also) that there was no privilege or power which could excuse him from answering. Why then make any such claim? And this brings us to the fair meaning of the Act taken by itself.

The reading of the Divisional Court involves some difficulties and objections : (1) This section is regarded as of elliptical construction and words are introduced that are not obviously intended. Thus "no person shall be excused" is read as "no person (claiming to be excused) shall be excused." (2) Again, the words "so given" are intensified into "given under compulsion," or, as more fully set forth in the reasons of the court, "answers tending to criminate which the witness objected to answer and was not excused from answering but was compelled to answer." (3) The scope of the section is restricted so as to provide only for conditional immunity from the answers, founded on privilege being claimed.

A better and more simple reading suggests itself thus, "No person shall be excused (*i.e.*, exempt or privileged) from answering any questions upon the ground that the answer to such question may tend to criminate him. \* \* Provided, however, that no evidence so given (*i.e.*, in answering any question) shall be used or receivable against such person," etc.

Let me now attempt to support this as the legitimate and proper reading of the section. The provincial law in force at the time provided that no person was compellable to answer any question tending to criminate himself (R. S. O. 1887, ch. 61, sec. 5). The rules of evidence in each Province were adopted by the Dominion in the Evidence Act, but subject to its provisions : 56 Vict. ch. 31, sec. 21. Section 5, saying that no person shall be excused from answering, does in effect compel him to answer, the "privilege of silence" being no longer available.

The phrase "excused from answering any question" appears (for the first time, I think) in the English Corrupt Practices Act of 1852 (15-16 Vict. ch. 57, sec. 9), in which, after providing that a witness should make true discovery of all things as to which he was excused and should be freed from all criminal prosecutions to which he might be liable, etc., the closing words are : "And no such person shall be excused from answering any questions put to him \* \* on the ground of any privilege or on the ground that the answer

to such questions will tend to criminate him." (See also Imperial Statute 17-18 Vict. ch. 38, secs. 5 & 6.) Assuming this to be the original of our legislation it is to be noted that the reference to the privilege expressed in the earlier is omitted in the later Canadian Act. Nevertheless, the implication of privilege to be repealed pervades the section and if any words were needed to amplify the meaning it would be thus: "No person (on the ground of any privilege) shall be excused," etc. Hence, a fair equivalent is to read: "No one shall be privileged from answering."

The word "excused" does not per se imply a prior request or claim. *Excusare* in civil law is "to relieve" or "absolve one from a thing"; Adams' "Glossary," vol. 1, p. 856 sub voce. A well recognized synonym for "excused" in this connection is "exempted." That is the very word used in the French version of the Act: "Personne ne sera exempté de répondre: *La Banque Jacques Cartier v. Gagnon*, 1894, 5 S. C. Que. 251. And the collocation is found in an analogous enactment as to the fraudulent marking of merchandise (R.S.C. ch. 166, sec. 12), by which it is declared that the provisions of the Act "shall not exempt or excuse any person from answering or making discovery upon examination as a witness," and it proceeds: "but no evidence \* \* which any person is so compelled to give or make shall be admissible in evidence against such person," etc. See also the marginal note to R.S.C. ch. 164, sec. 71, where "exempt" is used as expressive of "excused."

Again, the phrase "so given" implies no element of compulsion extraneous to the statute. The enactment does not read "no answer so given" but "no evidence so given," i.e., evidence given in answer to questions. That appears to be the turning point of the immunity granted; if a disclosure is responsive to questions on a compulsory examination during judicial proceedings it is protected: *Regina v. Strahan*, 1855, 7 Cox C. C., at p. 87; *Regina v. Cherry*, 1871, 12 Cox, at p. 39, Martin, B.

So an analogous provision is found in R. S. C. ch. 164, sec. 97, sub-sec. 3, as to false statements in relation to land



in British Columbia and cited in *Regina v. Williams*: "Nothing in this section shall entitle any person to refuse to make a complete discovery \* \* or to answer any question \* \* in any court; but no answer to any such \* \* question \* \* shall be admissible against any such person in any criminal proceeding." And further to the same effect is the provision in R. S. C. ch. 150, sec. 8, sub-sec. 2, relating to explosive substances. A witness examined under this section shall not be excused from answering any question on the ground that the answer thereto may criminate himself; but any statement made by any person in answer to any question put to him on examination under this section shall not (except in the case of perjury) be admissible in evidence against him in any proceeding, "civil or criminal." See also R. S. C. ch. 158, sec. 9, the Gaming House Act, where the certificate of protection merely shows that the witness made true and full disclosure and not that he made claim of his privilege. The full and true response is the ground of protection for evidence so given and not that the witness invokes some privilege taken away by the particular enactment.

So also in the provisions of the Larceny Act, R. S. C. ch. 164, sec. 71. The analogous English enactment is commented on in *Regina v. Erdheim*, 1896, 2 Q.B. at pp. 270-1, 3 Mans. B.C. at p. 149, by which answers to a compulsory examination are protected.

No intention to give a merely conditional indemnity appears on the face of the section conditioned on claiming a superseded privilege. Privilege is annulled for the purpose of being conceded; why should it exist for the purpose of being claimed?

Analogous legislation supplies examples of conditional legislation regarding kindred subjects. One statute R. S. C. ch. 9, sec. 39, is cited in *Regina v. Hendershott*; another may also be found in the criminal clauses of the Elections Act, R. S. C. ch. 8, sec. 109, which provides that "no person shall be excused from answering any question put", by the judge, "on the ground of privilege, or on the ground that the answer will tend to criminate \* \* ; but no answer given by any

person claiming to be excused on the ground of privilege or on the ground that such answer will tend to criminate himself, shall be used in any criminal proceeding against such person other than an indictment of perjury, if the judge \* \* gives to the witness a certificate that he claimed the right to be excused on either of the grounds aforesaid, and made full and true answer to the satisfaction of the judge."

This explicit method of providing that the privilege shall be claimed as a condition to obtaining the certificate is in marked contrast to the silence of the concise enactment now under discussion.

The construction given in *Regina v. Williams*, appears to involve incongruous results which are not to be attributed to the statute unless imperatively demanded by its language. There is no need to introduce a gradation of compulsion which extends the statute and appears to be foreign to its purpose. The witness speaks under lawful duress by virtue of the oath and the direction of the statute. The force of actual and possible compulsion is thus exhausted and there is no room left for any further exercise of constructive compulsion which may well be dispensed with. It is an odd result to hold that the law requires a witness to ask the Judge to excuse him from answering self-criminating questions and at the same time directs the Judge never to excuse a witness from answering such questions.

In the administration of criminal law Mr. Justice Coleridge advises that it is of great importance to proceed on all questions on broad grounds intelligible to the common sense of ordinary people : *Regina v. Wiley*, 1850, 2 Den. C. C. 48.

The conclusion now arrived at on the main point agrees with the decision on a New York statute in very nearly the same words as ours where the court held on similar evidence that the witness did not waive his rights by not setting up privilege for it would be a mere formal and useless objection, as he was protected by the statute in giving compulsory evidence ; *People v. Sharp*, 1887, 107 N. Y., 427, a case cited with approval in the Supreme Court of the United States in *Counselman v. Hitchcock*, 1891, 142 U.S., at p. 582.

The answer to the first point reserved should be that the evidence before the coroner given by the defendant was not admissible against him on this trial.

Upon the second question reserved there appears to be no serious objection to the reception of the evidence. There was on the theory of the Crown a plan, in the prisoner's mind which was carried out by overt acts shewing that he was accumulating insurance on the life of his wife, and the evidence objected to was as to various applications for insurance, some of which were followed by policies, others not. But all the applications were made practically at the same time and form parts of one transaction which can properly be given in evidence as a whole. Applications were made to the Metropolitan Company on November 25th, 1895, to the Equitable Company on November 26th, and to the New York Company on November 27th. A policy was issued by the Metropolitan on December 13th, 1895, existing at the death. Then came an application to the Provident on January 10th, 1896, followed by a policy on February 4th, 1896, which was also existing at the death. The other applications were not followed by policies. But I think the whole action of the defendant in relation to insurance was properly part of the *res gestæ* and relevant to the case presented by the Crown. The evidence being of a documentary character is not open to objections usually urged against parol testimony proving a series or a cluster of acts connectable with the crime, as forming part of the same transaction, or as done in pursuance of a common design or plan affecting the deceased. It is said in Wills' *Circumstantial Evidence*, that the principle is that all such relevant acts of the party as may reasonably be considered explanatory of his motives and purposes \* \* are admissible : 4th ed., p. 47. The practical test in all such cases is whether the matters to be proved are so remote that it is not worth while to let them be proved, and this is rather for the presiding Judge than for an appellate court to determine. This second question should be answered in favour of the evidence being received.

ROBERTSON, J.—

The prisoner was charged with the murder of his wife Katie Hammond. There was previously an enquiry before a coroner and jury, in due form, as to how or by what means the deceased came to her death, at which no particular person was charged with having been privy to her death. The prisoner and the deceased had been lately clandestinely married and under assumed names, in the city of Buffalo. The parents of both resided in Gravenhurst. The deceased had been found on a public street in a dying condition. The prisoner shortly before on the same day or evening had been in her company. He had been for some time engaged as an assistant in a drug store, and had lately commenced the study of the law.

I refer to those facts for the reason in my judgment that they afford a factor necessary to be taken into account to some extent in coming to a correct conclusion as to the first question put in the reserved case, now under consideration.

The Queen's Bench Division of the High Court, sitting as a Criminal Court of Appeal, in two cases—*Regina v. Madden*, 1894, 30 Can. Law Jour. 765, 14 C. L. T. 505, and *Regina v. Williams*, 1897, 28 O. R. 583—has decided that the evidence given at the coroner's inquest by the person subsequently charged with the crime, was admissible, on the ground that before giving such evidence he did not claim that such evidence might criminate him.

Then there is another case, *Regina v. Hendershott and Welter*, 1895, 26 O. R. 678, decided by the present Chief Justice of the Common Pleas, who was the trial Judge, in which he disallowed the evidence, notwithstanding the decision in *Regina v. Madden*. In *Regina v. Williams*, I was myself the trial Judge, and having the case of *Regina v. Hendershott* before me, I was so much impressed with the reasoning in it, that I felt bound in conscience to give effect to it and rejected the evidence, but, at the request of the Crown, reserved the case.

As the Courts of Appeal for criminal cases are now constituted, the decision of the Judges of one court is not

binding on the Judges sitting in another court of the same jurisdiction. In this respect the law is different as regards civil actions. There is a statutory provision in the Ontario Judicature Act which makes the decision of a court of co-ordinate jurisdiction in civil cases binding, but no such provision exists as regards the Courts of Criminal Appeal. The party, therefore, appealing has the right to the opinion of the particular court appealed to, as of first instance ; that court would, as a matter of course, give all due weight to the opinion expressed by another Court of co-ordinate jurisdiction, and would hesitate before deciding contrary to that opinion, although competent to do so, the remedy being, if it is against the prisoner, to appeal, under section 750 of the Criminal Code, to the Supreme Court of Canada, the Crown having no such right.

Before coming to the main question, I think it necessary to determine whether the coroner's court is a court within the jurisdiction of the Parliament of Canada. In *Regina v. Herford*, 1860, 3 E. & E. 115, it was decided that it was a criminal court. Section 568 of the Criminal Code recognizes it as such, and declares that where any person is charged with manslaughter or murder, the coroner shall, if the person affected by such verdict (that is, the verdict of the coroner's court) be not already charged with the said offence before a Justice of the Peace, by warrant under the hand of the coroner, direct that such person be taken into custody, and be conveyed, etc., before a Justice of the Peace, and it shall be the duty of the coroner to transmit to such Justice the depositions taken before him in the matter. And then by the same section the Justice is required to proceed in all respects as though such person had been brought before him on a warrant, etc. This is made necessary for the reason that section 642 of the Code declares that no one shall be tried on any coroner's inquisition. Besides there is the statutory provision which requires that no person shall be committed for trial on any criminal charge until he has first had his case inquired into, on a charge preferred before a justice of the peace. In the 4th volume of Blackstone's Commentaries (Lewis's ed.),

at p. 274, it is laid down that the coroner's court is a court of record and a criminal court of the realm. I think, therefore, there is no doubt that being such, that the proceedings before the coroner, although no person was charged, was a matter within the jurisdiction of the Parliament of Canada.

It appears from the evidence referred to in the reserved case, that the prisoner Hammond was brought before the coroner's court as a witness, with other witnesses; he was sworn to give evidence, and he was examined, not only by the coroner, but by the Crown Attorney, on behalf of the Crown. Could he have refused to have been sworn, or could he have refused to give evidence? Had he been charged with the offence of causing the death of the deceased, there is no doubt that although under sec. 4 of the Canada Evidence Act, 1893, 56 Vict. ch. 31 (D.) a competent witness, he could not have been called on behalf of the Crown to testify against himself. But section 5 declares that "no person shall be excused from answering any question upon the ground that the answer to such question may tend to criminate him, or may tend to establish his liability to a civil proceeding at the instance of the Crown, or of any other person: Provided, however, that no evidence so given shall be used or receivable in evidence against such person in any criminal proceeding thereafter instituted against him, other than a prosecution for perjury in giving such evidence."

I have no doubt the prisoner was a competent witness, and was compellable before the coroner, and was so, no matter whether he was interested or not, by reason of interest or crime; and he was bound to answer any question put to him, and could not be excused from answering upon the ground that the answer might criminate him, or tend to criminate him. It is said that he was warned by the coroner, or, as the coroner says, "I cautioned him that it was not necessary to be examined under oath, without he wished to be so, and that any evidence taken might be used against him," and the witness said "he wished to give his evidence." This is taken as a voluntary offer to give evidence which he could have avoided had he felt so disposed. In the first

place the coroner was wrong in making this statement to the witness. The coroner had no right to take a mere statement, not under oath, if that was what he meant by stating that it was not necessary to be examined under oath ; nor could the witness refuse to give evidence under oath. Section 5 expressly declares that "no person shall be excused from answering," etc., so that the coroner or the Crown, at that inquest, had the absolute right, under this section, to call upon the witness to be sworn and to testify, etc. And here it may be well to examine the circumstances surrounding the witness at that particular juncture. The inquiry was as to how his late wife had come to her death ; he was at least suspected of being in some way implicated in her death. Let him be innocent or guilty, when called upon to be and appear as a witness, he would know that the slightest reluctance on his part to tell all he knew about the cause of her death, or the surrounding circumstances, would tend to criminate him in the eyes of the jury, and the coroner, and the world. Knowing also, as he must be presumed to have known, the law, he expressed a willingness to do what he could not avoid doing. What else could he do ? He had no choice, a refusal would have been useless ; he could not be excused ; he knew that, and, therefore, he said, "I wish to give evidence." That was not under the circumstances a voluntary offer to give evidence, and cannot, in my judgment, be urged against him. He was a compellable witness ; the law said so, and he must be held to know what the law was. The coroner himself seemed to know that he could compel him to give evidence ; otherwise, he would not have sent a constable for him to appear at the inquest.

The intention of the Evidence Act was to enable the truth to be got at by all reasonable and proper means ; in all cases of enquiry into criminal matters it requires and will listen to no excuse on the-ground of incrimination, but it protects the witness by not allowing whatever he may be obliged to swear to, to be given in evidence thereafter against him in any criminal proceedings except for perjury, etc. It was contended before us that he might have

claimed protection under this same section 5, but I cannot agree to that. The section says, "no person shall be excused from answering," etc. How could he claim protection under the face of that provision? I am at a loss to understand by what process of reasoning that could be so determined.

In *Regina v. Williams*, the learned Chief Justice in his judgment says the reason for holding that the evidence was admissible in *Regina v. Madden*, was that the court was of opinion that the intention of the Legislature as expressed in section 5 was not to exclude evidence tending to criminate voluntarily given, but only such evidence when given under compulsion. With the greatest respect I beg to ask how can it be possible that, when a person who is not charged, is called upon to give evidence under section 5, it can be otherwise than compulsory? This person was not charged; he was called as a witness; he was bound to answer, no excuse as to criminality or otherwise would avail him; but he is assured that whatever he says which may tend to criminate him will not be given in evidence against him thereafter. The words "no evidence so given" mean the evidence given under that section, the very fact of his refusing to answer on the ground of incrimination would not excuse him. The Act intended to protect the witness; the very fact of sub-section 2 of section 4 prohibiting comment by Judge or counsel for the prosecution in addressing the jury, in case of a person charged failing to give evidence on his own behalf, on the trial, shews that every protection that can be, is afforded the witness. If the Legislature had intended that unless a witness claims privilege before answering a question which may tend to criminate under section 5, it would have been explicit in expressing that intention, as it did in the Controverted Elections Act, R. S. C. ch. 9, sec. 39, which is a similar provision, only that in that case the witness, although not excused, must obtain from the Judge before whom he is compelled to answer a certificate that he claimed the right to be excused on the grounds before stated, and made full and true answers to the satisfaction of the Judge. There is no



such provision in the Evidence Act now under discussion. The section itself protects the witness, whereas under the Controverted Elections Act it is the certificate of the Judge which protects him. Before the Evidence Act was passed, it was altogether different ; then no person could be compelled to answer any question the answer to which would criminate or tend to criminate him. Now it is otherwise ; he must answer, if called, but his evidence shall not be receivable in evidence against him, etc.

Let us look at it from another standpoint and for that purpose we will suppose that the witness after answering questions, the answers to which did not criminate or tend to criminate him, is asked, "Did you meet her on the Friday night on which she died?" His answer is "Yes." Then he is asked "Did you give her anything?" He refuses to answer on the ground that the answer may tend to criminate him. Could he be excused? Certainly not ; the section is express, and it makes no provision for claiming privilege. If he merely refused to answer without claiming privilege, under the law before the statute that would not be sufficient ; he was obliged to state the fact that the answer would tend to criminate, etc., and then the presiding Judge would excuse him, but all that is taken away by the statute as it now stands : "The test is whether he may object to answer. If he may and does not do so, he voluntarily submits to the examination to which he is subjected and such examination is admissible as evidence against him ;" *per* Jervis, C. J., in a case reserved in *Regina v. Sloggett*, 1856, Dears. C. C. 656 ; at that time there was no law such as we now have under section 5. With the greatest respect, therefore, I cannot come to any other conclusion, than that if the witness had asked to be excused on the ground that his answer would have criminated him, such excuse could not have been entertained ; he would have been told "You must answer, but your answer cannot be given in evidence against you, in case of any criminal proceedings hereafter instituted against you, other than for perjury," etc. It, therefore, made no difference whether he objected or not.

I do not think it necessary to pursue the subject further ; I have had the advantage of reading the very full, exhaustive and learned judgment just delivered by the Chancellor, in which I fully concur ; and in my judgment, the first question must be answered in the negative.

Then as to the second question, I can see no objection to the evidence as to what took place in regard to the applications made by the prisoner to have the life of his then wife insured, and in this I concur with the conclusion come to by the learned Chancellor.

MEREDITH, J. (dissenting)—

Assuming that the judgment of the Court of Appeal in criminal cases, in *Regina v. Madden*, 1894, 30 C. L. J. 765, or in *Regina v. Williams*, 1897, 28 O. R. 583, is in no sense binding upon this Court of Appeal in criminal cases, then we are required to again consider the somewhat vexed question, whether a person's depositions, taken at a coroner's inquest, are admissible in evidence against him, upon his trial for the offence which was the subject of that inquisition.

The question is whether the whole of such depositions, or only such parts thereof as were not voluntarily given, is, or are, inadmissible.

On the one side there is the reported judgment of the *nisi prius* case of *Regina v. Hendershott and Welter*, 1895, 26 O. R. 678, approved and followed by the Chancellor in the case of *Regina v. Urlin*, at the Elgin Assizes held at St. Thomas on February 12th, 1896, in which that learned Judge is credited with having said, that he preferred the reasoning in that case to that in the case of *Regina v. Madden* ; and also followed by Robertson, J., at the trial of the case of *Regina v. Williams* ; in all of which cases the depositions were wholly rejected, on the ground that the Act makes them inadmissible whether the witness objected or not.

On the other side there are the unanimous opinions of two, in the one case, and of the three, in the other, of the Judges of the Queen's Bench Division, sitting as a Court of Appeal, under the provisions of the Criminal Code, 1892, in

the cases of *Regina v. Madden* and *Regina v. Williams* above referred to, that such depositions are inadmissible only in so far as the witness has asked to be excused from answering, in effect claimed and by virtue of the Act, been denied, the privilege of silence.

In my judgment the latter cases interpret more correctly than the former, this somewhat ambiguous enactment.

The section in question is in these words : [setting out the section.]

Admittedly the meaning is not plain ; obviously, whichever interpretation is accepted, some variation of the words is needed to make it plain.

The section does not in terms provide that no evidence given by any person who testifies in any criminal proceedings shall be used in evidence against such person ; nor, on the other hand, that no evidence which such person has objected to give, or has asked to be excused from giving, shall be used against him.

And that being so it is proper to consider what the law was upon the subject before the enactment, and what was sought to be remedied by it.

Now, admittedly, the law before was settled that such depositions were admissible in evidence ; that if the witness desired to avoid that effect, he should claim the privilege of refusing to answer, on the ground that the answer might tend to criminate him, and so avoid making any self-criminatory admissions.

And the object of the enactment was to take away that privilege in order that the whole evidence bearing upon the subject matter of the trial or investigation might be elicited ; but to do so in such a manner as to save the witness to the same extent, as far as possible, as his silence would before have saved him ; that is, removing the privilege for the purpose of discovering the truth, yet to leave the witness as well protected as if the privilege had not been taken away. It was not passed to extend any privilege or protection of a witness, but that effect is given to it by the first mentioned cases.

To have done more than that would have been retrogression in the law of evidence, which tends toward the admission rather than the rejection of evidence, leaving the weight of it to the consideration of the jury.

This very Act shews plainly the strong trend, legislatively, towards the admission of evidence in its provisions, that no person shall be incompetent to give evidence by reason of interest or crime, and that every person charged with an offence, and the wife or husband of such a person, shall be a competent witness. And now that the person charged can give evidence on his own behalf in denial or explanation of any admissions said to have been made by him, there is room for enlarging rather than curtailing the scope of evidence of admissions or confessions.

These provisions are contained in the third and fourth sections of the Act, and we are asked to construe the next following section as rendering inadmissible evidence which otherwise would be plainly admissible.

If the plain words of the section require it, we must, of course, give the enactment that effect; but if they may equally convey the meaning that the safeguard of the witness is to be only as wide as the removal of his privilege, then that interpretation ought to prevail.

Now the words "no person shall be excused from answering any question on the ground that the answer to such question may tend to criminate him," do not, to my mind, indicate an intention to enact an unlimited provision removing all right to object to answer, and indicating to the witness that it is needless to object, or claim the privilege, or to ask to be excused from answering; nor do the words "no evidence so given" seem to me to imply protection against the use of every word of the evidence given, as the words "no evidence given by such person" might. The enactment seems to keep in mind the then existing privilege of silence, and to strike at that only and expressly, making a corresponding and commensurate protection only. "No evidence so given" must refer to excused answers to questions which may tend to criminate, for that is the only

"evidence" before referred to in the section. And, having regard to the then state of the law of evidence in criminal matters, "excused answers" mean answers not voluntarily given, but in respect of which the privilege of silence or protection is claimed.

It seems to me that very much that has been said in favor of the inadmissibility of the evidence is the same as was advanced and refuted in the case of *Regina v. Coote*, 1873, L. R. 4 P. C. 599.

To say that admissions are not voluntary when made by a witness under oath, is merely to find fault with the cases (binding upon us), which have settled the law to the contrary; and to call a claim to protection an idle form, is also, in a measure, to quarrel with those cases, for they have settled the price of the privilege of silence at the claiming of it; how then can it be so very unreasonable to put the price of the statutory protection at the asking of it?

And the better time to stamp the admissions as voluntary or involuntary is when they are made, not when the person who made them, under the solemnity of an oath, endeavours to silence them, in order to escape condemnation.

I can perceive no good reason for thinking that it was meant by the enactment to exclude all admissions made by a witness under oath, even against an expressed desire of the witness when making them, yet that is the effect of holding that the statute makes all the evidence tending to criminate, inadmissible whether or not privilege or protection is claimed; and it prevents any ruling upon the question whether the evidence may have that effect, at the time it is given.

It is said that a person may be misled if the wider effect is not given to the words "no evidence so given;" that every person is supposed to know the law, and, therefore, to know of this enactment, and to give evidence under it without claiming privilege or asking protection; but that contention helps not at all, for if the enactment have the meaning I have ascribed to it, the witness by like supposition, knows that that is the law; that the law is substantially as it was before;

that there must be a claim or request to be excused or objection to answer, otherwise all that is stated stands upon the footing of a voluntary admission. But, doubtless, the witness knows nothing of the law ; can hardly know what it is in a case where there is so much judicial difference of opinion upon the subject ; and in this particular case the evidence was given quite voluntarily, after warning of what the consequences might be, amounting to dissuasion ; and, according to the cases, it was the right of the witness to give evidence ; the coroner could not lawfully prevent it ; see *Rex v. Scorey*, 1748, 1 Leach C. C. 43, and *Wakley v. Cooke*, 1849, 4 Exch. 511.

It can hardly have been the intention of Parliament that a man, no matter how learned or how cunning he might be, could force his evidence upon the inquest and yet be wholly protected against anything he might say, but that is the effect of *Regina v. Hendershott and Welter*, 1895, 26 O. R. 678, and the cases following it.

The ruling in this respect upon this question, based altogether upon the authority of *Regina v. Williams*, 1897, 28 O. R. 583, was, therefore, in my opinion, right, and should be affirmed.

But before leaving this branch of the case I desire to refer to two points relied upon by the Crown.

The first was that the coroner's inquest was not a criminal proceeding, nor a civil proceeding or matter within the powers of Federal legislation, and so the Act in question did not aid the prisoner.

But the enumeration of a coroner's inquisition *super visum corporis* by Blackstone "among the criminal courts of the nation" is well supported by authority ; indeed, I venture to say that nothing to the contrary can be found in any of the books. The authorities are very diligently collected and learnedly dealt with in such cases as *Garnett v. Ferrand*, 1827, 6 B. & C. 611 ; *Regina v. Herford*, 1860, 3 E. & E. 115, and *Thomas v. Chirton*, 1862, 2 B. & S. 475 ; and, as they all point that one way, nothing will be gained by my doing more than referring to them.

The fact that the results of such inquisition have been to some extent curtailed (see Criminal Code, 1892, 55-56 Vict. ch. 29, secs. 568, 642), cannot affect the character of the proceedings.

The other point, namely, that the "person" referred to in section 5 is the person referred to in section 4, that is, the person charged only, was not abandoned by Mr. Cartwright, but is without weight. The word "person" in section 5 no doubt means "person under examination as a witness," or, shortly, "witness."

As to the other question reserved for our consideration I am also of opinion that the ruling at the trial was right and ought to be affirmed.

If the evidence in question had been tendered for the sole purpose of shewing a motive for the crime, existing at the time of death, and would have that effect only, there would be much in Mr. Johnston's contention, and I would probably have rejected it on the ground of remoteness, if not irrelevance.

But that was not its purpose or effect. Its purpose was to shew, in connection with the other evidence, an intention in the prisoner, and a scheme conceived by him at or before the time of the applications for the life insurance, to obtain as much of such insurance as he could upon his wife's life and then by some foul means or other end it, and, therefore, whatever weight this evidence may have had, it seems to me that it could not have been rightly rejected. And besides this, the applications for insurance which were effected and the applications which failed of effect, were made for the like purpose, at the same time, and under the same, or the like, circumstances, and the details of those of the one class could hardly be given without to some extent at least referring to the others, the whole being a somewhat intermingled story of the prisoner's efforts to make, according to the contention of the Crown, a profit of his wife's death.

**Notes:**

*Evidence—Voluntary admissions—Prior testimony of accused when compellable to answer.*

Since the decision in the principal case, an amendment to sec. 5 of the Canada Evidence Act was passed June 13, 1898, by the Parliament of Canada (61 Vic., c. 53, s. 1).

The substituted section is as follows :—

“ 5. No witness shall be excused from answering any question upon the ground that the answer to such question may tend to criminate him, or may tend to establish his liability to a civil proceeding at the instance of the Crown or of any person ; provided, however, that if with respect to any question the witness objects to answer upon the ground that his answer may tend to criminate him or may tend to establish his liability to a civil proceeding at the instance of the Crown or of any person, and if but for this section the witness would therefore have been excused from answering such question, then, although the witness shall be compelled to answer, yet the answer so given shall not be used or receivable in evidence against him in any criminal trial or other criminal proceeding against him thereafter taking place other than a prosecution for perjury in giving such evidence.”

Under the old law, a confession or admission by a person when called as a witness was admissible only if made freely and voluntarily, and after proper caution that he was not bound to criminate himself. *R. v. Garbett*, 1847, 1 Den. Cr. Cas. 236 ; *R. v. Mercer*, 1818, 2 Stark, N.P. 366.

*Amendment of 1898.*

By the Act of 1898, *supra*, no witness shall be excused from answering upon the ground that the answer may tend to criminate him. If, however, he objects, in other words, if he claims privilege, then, *although the witness shall be compelled to answer*, the answer so given shall not be used or receivable in evidence against him in any criminal trial, etc., other than a prosecution for perjury in giving such evidence.

The answers given by a witness who is called otherwise than at his own request, or who does not voluntarily tender



**Notes : (Continued.)**

his evidence, may well be considered as given under compulsion, whether the witness takes the objection or not. And where he does not object, there is room for contention that the Act of 1898 does not apply further than to make compulsory the answers as to which the privilege of refusing to incriminate himself was formerly accorded to a witness, and that the evidence may still be excluded as evidence to prove his criminality because not given freely and voluntarily. The first part of the section makes it compulsory on the part of a witness to answer even if the answer incriminates. The proviso deals only with the case where objection by the witness is taken. The case where no objection is taken is not provided for. It may, therefore, be argued that this latter case is untouched by the amendment, and that the user of the evidence so given without objection is governed by the former law and is not covered either by express words or necessary implication. The section, being one affecting the liberty of the subject and his rights in a criminal proceeding, must be construed strictly.

*Confession—Admissions on interrogation by police officer or person in authority.*

The leading English case upon the subject is *R. v. Thompson*, 1893, 2 Q.B. 12. It was there held on a case reserved by a court consisting of Coleridge, C.J., Hawkins, Day, Wills and Cave, JJ., that before a confession can be received in evidence of criminality, it must be proved *affirmatively* that it was free and voluntary, and was not preceded by any inducement held out by any person in authority. The onus is upon the Crown of proving that the statement was free and voluntary and not as has heretofore been frequently supposed upon the prisoner to prove that the statement was given not voluntarily but under pressure of threats or inducements.

The rule was there stated to be that a confession, in order to be admissible, must be free and voluntary; that is, must not be extracted by any sort of threats or violence, nor obtained by any direct or implied promises, however slight,

**Notes : (Continued.)**

nor by the exertion of any improper influence. *R. v. Thompson*, *supra*.

The inducement need not be held out to the prisoner direct, and, where it was held out by his employer to the relatives of the prisoner, it may be inferred that it was communicated to the prisoner. *R. v. Thompson*, 1893, 2 Q.B. 12. If, however, there is no suggestion of threat or inducement, or of a disposition on the part of the prosecutor to manufacture evidence, the evidence is admissible. *Rogers v. Hawken*, 1898, 33 Eng. Law Jour. 174. (Russell, L.C.J., and Mathew, J.)

In a case where the person in authority to whom the admission was made would not swear that he did not hold out any threat or inducement to the prisoner to make the statement, it was held that such onus is not satisfied by the evidence of the interpreter who said that he remembered that "any statement the prisoner made was voluntary," since it was not shewn that the interpreter knew what was in law a voluntary statement. *R. v. Charcoal*, 1897, 34 Can. Law Jour. 210 (N.W.T.).

A confession induced by false statements of the officer as to the knowledge already obtained in regard to the alleged offence is not a free and voluntary confession. So where an accused was charged with stealing a post letter, and had made admissions in presence of a detective and a post office inspector, after the latter had said to him, "There is no use your denying it. You were seen taking the letters out of the box. You may as well tell us what you did with them, as have it brought out in a court of law," and it was admitted by the Crown that there was no evidence that accused was seen taking the letters, it was held that the evidence was inadmissible, not only because of the threat implied in the statement of the inspector, but because the admission had been improperly obtained by means of a false statement by a person in authority. *R. v. McDonald*, 1896, 32 Can. Law Jour. 783 (*per* Scott, J., Supreme Court of N.W.T.).

The question came up in Ontario in a case of *R. v. Day*, 1890, 20 O.R. 209, before the Queen's Bench Division, and it was held that evidence obtained by questioning prisoners

**Notes :** (*Continued.*)

was legally admissible where the prisoner had been given the usual caution against saying anything. The Court, however, reprehended the practice of questioning prisoners, Armour C.J., stating that the superiors of the detectives should instruct them not to do so.

When a statement of one accused of murder is induced by words of a police officer which, under all the circumstances of the case, must give rise to some fear or hope of favor in the mind of the accused, such statement is not properly admitted in evidence against him. *Bram v. United States*, 1898, 18 Sup. Ct. Rep. (U.S.) 183. In that case, Bram was convicted of murder on the high seas. His arrest was effected on the arrival of the vessel at Halifax, and he was taken to the office of a police detective, and stripped and searched. In the course of the search, the detective said to him: "Bram, we are trying to unravel this horrible mystery; your position is rather an awkward one. I have had Brown in this office, and he made a statement that he saw you do the murder." Bram replied: "He could not have seen me; where was he?" The detective said: "He states he was at the wheel." Bram then said: "Well, he could not see me from there." The detective then said: "Now, look here, Bram. I am satisfied that you killed the captain, from all I have heard from Mr. Brown; but some of us here think you could not have done all that crime alone. If you had an accomplice, you should say so, and not have the blame of this horrible crime on your own shoulders." Bram replied: "Well, I think—and many others on board the ship think—that Brown is the murderer; but I don't know anything about it." Bram was extradited to the United States; and evidence of the detective as to the above admissions having been admitted at the trial, the Supreme Court of the United States held that a new trial should be granted, and that the alleged admissions were obtained by undue influence, although the strict meaning of the detective's words were neither to threaten nor to promise.

There is much conflict of authority in England as to the admission of statements made by a prisoner to a police officer in answer to the latter's enquiries. It was held by Mr.

**Notes: (Continued.)**

Justice Smith in *R. v. Gavin*, 1885, 15 Cox Cr. Cas. 656, that when a prisoner is in custody the police have no right to ask him questions. The same view was expressed by Cave, J., in *R. v. Male*, 1893, 17 Cox Cr. Cas. 689, in which he said that the law does not allow the judge or jury to put questions in open court to a prisoner, and it would be monstrous if it permitted a police officer, without anyone present to check him, to put a prisoner through an examination and then produce the effects of it against him. The police officer should keep his mouth shut and his ears open, should listen and report, neither encouraging nor discouraging a statement, but putting no questions. The same learned judge is also reported as having stated at a *nisi prius* trial that he would exclude all evidence obtained by a system of private interrogation of accused persons by the police, and that he believed most of the judges agreed with his opinion. 20 Montreal Legal News 272.

The opposite view is, however, taken by Day, J., in *R. v. Brackenbury*, 1893, 17 Cox Cr. Cas. 628, where he admitted evidence of statements made by the accused in answer to questions put by the police immediately prior to the arrest, and expressed his dissent from the decision in *R. v. Gavin*, supra. See also *R. v. Jarvis*, 1867, L.R. 1 C.C.R. 96, and *R. v. Reeve*, 1872, L.R. 1 C.C.R. 362.

**Canadian Indians—Confession to Government agent.**

In *R. v. Charcoal (Pah-cah-pah-ne-capi)*, 1897, 34 Can. Law Jour. 210, it was held by the Supreme Court of the Northwest Territories that in the case of Indians, who are wards of the Government, the rules forbidding the admissibility of confessions to a person in authority, without sufficient previous warning, should be strictly enforced; and evidence of an Indian agent, a Government officer appointed to carry out the Indian Act and "ex officio" a justice of the peace, as to an admission made by the accused Indian, was held to have been improperly received, and the conviction was quashed. (Wetmore, Richardson, Rouleau and McGuire, JJ.)

**Former deposition in civil proceeding.**

See *R. v. Douglas*, ante 221 and note, ante 228.

## [COURT OF QUEEN'S BENCH, QUEBEC.]

BEFORE WURTELE, J.

## THE QUEEN v. SHEEHAN.

*Mixed jury—Constitutional right to claim in Quebec—Re-election in favor of ordinary jury—Mixed jury a matter of procedure, not of organisation of Court—  
Cr. Code 670.*

1. A prisoner arraigned for trial in Quebec has the right to claim a jury composed for one-half at least of persons speaking his language if French or English.
2. The right to a mixed jury in Quebec conferred by 27-28 Vic. 41 (Prov. of Canada) in criminal cases is essentially a matter of criminal procedure and as such within the legislative authority of the Federal Parliament only, and not within the scope of provincial legislation under the heading of "the constitution and organization of the Courts," B. N. A. Act 92 (14).
3. A statute of the legislature of the Province of Quebec purporting to repeal the Act conferring such right is *ultra vires* so far as such right to a mixed jury is sought to be affected.
4. After having claimed a mixed jury and the recording of the order therefor by the Court, the prisoner has no absolute right to relinquish such claim and to have the order for a mixed jury superseded, but revocation may be ordered on such an application in the discretion of the Court.

DECIDED : March 15, 1897.

When the prisoner was arraigned he declared that his language was the French language, and he demanded a mixed jury, to be composed of six jurors speaking the French language and of six speaking the English language. His demand was granted as a matter of course, but when he was brought to the bar for his trial, he asked as a right that the order for a mixed jury should be superseded, and that the jury should be formed in the ordinary manner.

*J. L. Archambault, Q. C., and M. J. F. Quinn, Q. C., for the Crown.*

*J. F. Dubreuil, for the prisoner.*

MONTREAL, March, 15, 1897.

WURTELE, J.—

The Criminal Code contains no express provision for a mixed jury in the Province of Quebec, although the right to one is alluded to in art. 670, which lays down the rule to be followed with respect to peremptory challenges in such cases and assumes that the right exists.

Paragraph 2 of section 7 of the statute of the Province of Canada 27-28 Vict. chap. 41, enacts that "if any prosecuted party, upon being arraigned, demands a jury composed, for one-half, at least, of persons skilled in the language of his defence, if such language be English or French, he shall be tried by a jury composed, for the one-half, at least, of the persons . . . upon the panel . . . who are skilled in the language of the defence." This clause, which gives the right to a mixed jury, in the Province of Quebec, confers a constitutional right, which has no correlation with the organization of the courts of criminal jurisdiction, and is essentially a matter of criminal procedure; and its subject matter does not therefore fall under the legislative authority of the Quebec legislature. Although that legislature repealed the statute which contains this provision, it had no power to abrogate the right which had been given by the Parliament of Canada to persons brought before the courts for trial, to obtain a jury composed for one half of jurors speaking their own language, and the particular clause containing this right, therefore, remained in force notwithstanding the repeal of the statute by the legislature. The Parliament of Canada alone has the right to legislate on this matter, and as a matter of fact has done so in art. 665 of the Criminal Code which grants mixed juries in Manitoba and provides how they are to be formed.

The law confers a right which is not to be granted merely in the discretion of the Court, but which must be allowed as a matter of right. The statute does not say that the prosecuted party may be tried, but enjoins that he shall be tried by a jury which shall contain six jurors speaking his language.

But when the order for a mixed jury has been recorded, can the accused relinquish his right and ask as a matter of course that the order be superseded and that the jury be formed in the ordinary manner, as if he had not asked for a mixed jury? On this point the law is silent. The accused, certainly, has no right at his will to obtain the revocation of an order of the Court formally entered on the record, when no law exists to that effect. The prisoner's demand claiming as a right that the order for a mixed jury be superseded cannot be entertained. But if he cannot ask this as a matter of right, he may, at all events, ask the Court in its discretion, to revoke, with his consent, its order for a mixed jury and to order that the jury be formed in the ordinary manner; and the Court in such case may in the exercise of its discretion do so.

In this case, I am disposed, in the exercise of my discretion, to revoke the order for a mixed jury, and I consequently do now revoke the order and direct that the clerk proceed to the formation of the jury for the prisoner's trial as if the order for a mixed jury had not been given.

## [HIGH COURT OF JUSTICE, ONTARIO.]

BEFORE MEREDITH, C.J., ROSE AND MACMAHON, JJ.,  
SITTING AS A DIVISIONAL COURT.

## THE QUEEN v. HENRY GRAHAM.

*Certiorari in Criminal Matter—Interlocutory Order—Appeal  
from—Application of Cr. Code, Secs. 897, 898—  
“Weekly Court” in Ontario—Jurisdiction.*

1. Proceedings by way of *certiorari* against a summary conviction do not constitute an “appeal” under Cr. Code, sec. 897.
2. Costs awarded against a magistrate in respect of an unsuccessful interlocutory application made by him in *certiorari* proceedings are not governed by Cr. Code, sec. 897, and should be directed to be paid to the opposite party direct instead of to the clerk of the peace or other officer of the court which made the order.
3. The proceedings for enforcement of an order for costs provided by Cr. Code, sec. 898, apply only to costs dealt with by a Court of General Sessions on affirming or quashing a conviction or order, on appeal to that court.
4. An *ex parte* order made by a judge of the High Court of Justice (Ontario) in a *certiorari* proceeding in a criminal matter is not subject to review or to be set aside by another judge sitting in “Weekly Court,” but is appealable to a Division Court of the High Court sitting *en banc*.

ARGUED : January 10, 1898.

DECIDED : February 14, 1898.

Appeal by the police magistrate of the Town of Toronto Junction from an order made by Falconbridge, J., in weekly Court, refusing to set aside an order of Ferguson, J., whereby a previous order made by the latter was varied by directing payment to the Clerk of the Peace of costs awarded to the defendant against the magistrate in respect of the latter's unsuccessful motion to have certain affidavits taken from the files of the Court as scandalous ; and also for leave to appeal direct from the order of Ferguson, J., making such variation.

Section 892 of the Criminal Code, under title VII. relating to summary convictions, gives power to the Court to prescribe by general order for the giving of a recognizance in *certiorari*



proceedings as a condition of hearing any "motion to quash" a conviction before a justice.

Sec. 895 also relates to a "motion or rule to quash" a conviction. The next following sections are as follows:

896. Whenever it appears by the conviction that the defendant has appeared and pleaded, and the merits have been tried, and the defendant has not *appealed* against the conviction, where an appeal is allowed, or if appealed against, the conviction has been affirmed, such conviction shall not afterwards be *set aside or vacated* in consequence of any defect of form whatever, but the construction shall be such a fair and liberal construction as will be agreeable to the justice of the case.

897. If upon any appeal the Court trying the appeal orders either party to pay costs, the order shall direct the costs to be paid to the clerk of the peace or other proper officer of the Court, to be paid over by him to the person entitled to the same, and shall state within what time the costs shall be paid.

898. If such costs are not paid within the time so limited, and the person ordered to pay the same has not been bound by any recognizance conditioned to pay such costs, the clerk of the peace or his deputy, on application of the person entitled to the costs, or of any person on his behalf, and on payment of any fee to which he is entitled, shall grant to the person so applying, a certificate that the costs have not been paid; and upon production of the certificate to any justice in and for the same territorial division, such justice may enforce the payment of the costs by warrant of distress in manner aforesaid, and in default of distress may commit the person against whom the warrant has issued in manner hereinbefore mentioned, for any term not exceeding one month, unless the amount of the costs and all costs and charges of the distress and also the costs of the commitment and conveying of the party to prison, if the justice thinks fit so to order (the amount thereof being ascertained and stated in the commitment), are sooner paid, etc.

*DuVernet* and *Woods* for the appellant, the police magistrate.

*Murphy, Q.C.*, for the defendant.

TORONTO, February 14, 1898.

MEREDITH, C.J.—

An order having been made for the removal by *certiorari* into the High Court of the conviction of the defendant by the police magistrate of the town of Toronto Junction, for an assault, the police magistrate applied to Mr. Justice Ferguson for an order to take from the files of the Court an affidavit filed on behalf of the defendant, which the police magistrate alleged to contain scandalous matter reflecting upon him; the application was opposed and ultimately was dismissed with costs.

The order dismissing the motion was drawn up and entered. It bears date 29th October, 1897, and was entered on the 4th November following, and provides that the costs of the application be paid "by the said the police magistrate of West Toronto Junction to the said Henry Graham" (the defendant) "forthwith after taxation thereof."

On the 1st November last the conviction was quashed without costs.

On the 15th of the same month the defendant, acting on the view that the only authority to give costs in a matter such as this is conferred by section 897 of the Criminal Code, 1892, and that that section requires that where costs are given they should be paid to the clerk of the peace, and that the remedy provided by section 898 for the recovery of them is applicable to the costs dealt with by Mr. Justice Ferguson, applied *ex parte* to that learned Judge to vary his order by providing that the costs should be paid to the clerk of the peace of the county of York on or before the 29th November, 1897, and by the clerk of the peace paid over to Graham, and the application having been granted an order was drawn up varying the original order in that way.

From that order, the police magistrate appealed, and his appeal having been heard in the weekly Court by Mr. Justice Falconbridge, was dismissed.

The police magistrate now appeals from the order of Mr. Justice Falconbridge, and applies for leave to appeal from the order of Mr. Justice Ferguson of the 15th November, 1897.

It is contended by the appellant : (1) That sections 897 and 898 of the Criminal Code have no application to the costs dealt with by Mr. Justice Ferguson. (2) That that learned Judge had no power on an *ex parte* application to vary the previous order made by him after it had been drawn up and entered. (3) That Mr. Justice Falconbridge had power under Consolidated Rule 358 to rescind the order of the 15th November, 1897, and ought to have rescinded it.

We think it abundantly clear that sections 897 and 898 of the Criminal Code have no application to the costs dealt with by Mr. Justice Ferguson.

The appeal referred to in section 897 is the appeal to the Court of General Sessions of the Peace, for which the preceding sections provide, and the court referred to is that Court ; the forms provided by section 898 shew that the costs which are referred to are costs dealt with by the Court of General Sessions of the Peace on affirming or quashing a conviction or order on appeal to it. Some of the sections preceding section 897 deal with proceedings by *certiorari*, and they are not spoken of as appeals, but different language is used in referring to them. See section 897, where the language is "application to quash a conviction," and section 892, where it is "motion to quash," and even if an application to quash a conviction is sometimes spoken of as an appeal from the conviction, that is not what such an application is usually called, or indeed an accurate form of expression as applied to it.

We think, therefore, that the order of the 15th November cannot be supported as an order under section 897, and that an order for payment of the costs in question here to the clerk of the peace with a view to payment of them being enforced under section 898 ought not to have been made.

If, as the applicant contends, the order of the 15th November was an order in a criminal matter or proceeding, the Consolidated Rules have no application to it, and the proper forum in which to apply by way of appeal from it or to set it aside was not the Weekly Court, but the High Court ; the learned Judge in making the order acted as the delegate of

the High Court, and his order was open to review only in that Court.

In this view, Mr. Justice Falconbridge was right in refusing to interfere, and the appeal from him should be dismissed.

It was agreed on the argument that if we were of opinion that leave should be given to appeal from the order of the 15th November, we should deal with that branch of the case as on an appeal from that order. The result is that we give leave to appeal from the order of the 15th November and allow the appeal and discharge the order, and we dismiss the appeal from the order of Mr. Justice Falconbridge.

As each party succeeds in part and fails in part, there will be no costs of the appeals to either of them.

ROSE and MACMAHON, JJ., concurred.

## [SUPREME COURT OF NEW BRUNSWICK.]

BEFORE TUCK, HANINGTON, LANDRY, BARKER, AND  
VAN WART, JJ.

**Ex Parte McCoy.**

*Magistrate—Bias—Pecuniary interest—Fixed appropriation  
out of fines additional to salary—Canada Temperance Act—  
Keeping liquor for sale—Evidence of proprietary interest.*

1. A magistrate is not disqualified on the ground of pecuniary interest from adjudicating upon an offence under the Canada Temperance Act, because he receives a fixed appropriation voted by a Municipal Council, in addition to his regular salary as magistrate, for his services in connection with the enforcement of the Canada Temperance Act, and because such appropriation is paid out of a fund created by the imposition of fines thereunder.

DECIDED : January 28, 1896.

Motion for a rule nisi for certiorari to quash a conviction made by the police magistrate of Fredericton for keeping liquor for sale contrary to the Canada Temperance Act, on the following grounds :

1. That the police magistrate was disqualified to act on the ground of pecuniary interest. The City Council voted to him, in addition to his regular salary of \$400, the sum of \$100 for his services in connection with the enforcement of the Canada Temperance Act, which latter sum was paid out of a fund created by the imposition of fines for violation of the Act.

2. That there was no evidence to connect the accused with the offence. The premises where the liquor was sold had been regularly leased by McCoy to one Murphy ; the lease was proved and put in evidence, and its bona fides sworn to by Murphy, who also swore that McCoy had nothing to do with the premises and no interest in the business during the time at which the offence was charged to have been committed. A witness had sworn that he obtained liquor from a young man whom he understood to be McCoy's son ; but, on cross-examination, he admitted that he did not

know who the young man was. Neither McCoy nor his son gave evidence. [*R. v. Coulson*, 1896, 32 Can. Law Jour. 33, 27 Ont., R. 59, noted *ante*, p. 118.]

*Barry* for the motion.

FREDERICTON, January 28, 1896.

PER CURIAM—

We think that there is nothing in the first point.

As to the second point, it would have been a very easy matter to have removed all doubts by the applicant swearing that he had no interest in the business. The magistrate having found that he had, we will not interfere with his decision. The rule must be refused.

*Application dismissed.*

**Note :** *Disqualification of magistrate — Bias — Pecuniary interest.*

The magistrate must not unite in his own person the functions of judge and prosecutor. *Monson's Case*, 1894, 1 Q.B. 750.

If a prosecution be brought for the benefit of a small class of privileged persons, of whom the magistrate is one, the conviction will be quashed on the ground of the pecuniary interest of the justice. *R. v. Huggins*, 1895, 1 Q.B. 563. But if the ordinary members of the society or association on whose behalf the prosecution is brought have no control over or responsibility for any prosecution brought by the society, the fact that the magistrate is one of the ordinary members will not suffice to disqualify him. *Allinson v. General Council*, 1894, 1 Q.B. 750. So where a prosecution was brought at the instance of the Incorporated Law Society, and a conviction obtained for falsely pretending to be a solicitor, but no part of the fine was payable to the society, it was held that the fact of one of the magistrates being a member of the society furnished no reasonable ground for supposing that he was biased, nor did it constitute him a party on whose behalf the prosecution was taken or give him

**Notes: (Continued.)**

a pecuniary interest therein, although the society was under the liability of having an order for costs made against it. *R. v. Burton*, 1897, 2 Q.B. 468; *R. v. Mayor of Deal*, 45 L.T. 439.

And since the decision of the case here reported, it has been held by the Supreme Court of New Brunswick that a stipendiary magistrate is not disqualified from trying cases brought under the Canada Temperance Act, by reason of his being a ratepayer of the town into whose treasury the fines collected under the Act were payable. *Ex parte Gorman*, 1898, 34 Can. Law Jour. 175; *ex parte Driscoll*, 27 N.B. R. 216 followed; *Town of Moncton v. Hebert*, 1897, (N. B.), not reported, overruled.

That one of the convicting magistrates held the office of Liquor License Inspector in an adjoining district to that in which he adjudicated upon a charge under the Liquor License Act (N. B.) is no evidence of bias. *Ex parte Michaud*, 1896, 32 Can. Law Jour. 779.

The fact that a *qui tam* action is pending against the magistrate at the suit of the husband of the convicted party is a ground of bias. *Ex parte Hannah Gallagher*, 1897, 33 Can. Law Jour. 547, (Sup. Ct. N. B.). But a *qui tam* action at the suit of the father of the accused is not a sufficient ground. *Ex parte Thomas Gallagher*, 1897, 33 Can. Law Jour. 547.

The relationship, subsisting because of being married to sisters, between the magistrate and the chief inspector of licenses, who was the informant and prosecutor in the proceedings in which the conviction was made, will not disqualify the magistrate from hearing the case. *R. v. Major*, 1897, 33 Can. Law Jour. 162. (Sup. Ct. Nova Scotia).

## [COURT OF QUEEN'S BENCH, QUEBEC.]

BEFORE CURRAN, J.

## THE QUEEN V. LAPIERRE.

*Attempt to commit murder—Cruelty to child—Evidence—  
Cross-examination on irrelevant question—No rebuttal  
of answer to impeach credit—Indictment—Multi-  
fariousness—Abandonment of part—  
Cr. Code 210, 215, 232, 611.*

1. Upon a charge of causing grievous bodily harm to a child under defendants' care with intent to bring about the child's death, evidence of acts of cruelty by defendants to another child also in defendants' care are irrelevant to the case and inadmissible.
2. The answer of a prisoner examined as a witness on his own behalf to a question in cross-examination foreign to the issue, must be accepted as final; and the prosecution is not entitled to call rebuttal evidence to contradict it for the mere purpose of impeaching the credit of the witness.
3. An indictment multifarious in that it combines a charge of a failure to provide necessaries for a child under sixteen under Cr. Code 210, 215 with a charge of an attempt to murder the child (Cr. Code 232) and to which indictment the prisoners pleaded is sufficient upon which to base a conviction thereon for the latter offence without a formal amendment of the indictment, where the presiding judge has withdrawn from the jury that portion of the charge based upon secs. 210 and 215.

DECIDED : October, 1897.

The prisoners, Thomas Lapierre and Rebecca Roy, were indicted at Sherbrooke in the District of St. Francis, as follows :

" DISTRICT OF ST. FRANCIS, to wit :

" The Jurors of our Lady the Queen present : that at the Township of St. George de Windsor, in the District of St. Francis, on the twenty-sixth day of February, in the year of our Lord, one thousand eight hundred and ninety-seven, and at various times during the three months preceding that date, Thomas Lapierre and his wife, Rebecca Roy, did unlawfully and wilfully neglect and omit, without lawful excuse, to provide necessaries for Céline Lapierre, the daughter under sixteen years of age, of the said Thomas Lapierre, and the



step-daughter of the said Rebecca Roy, the said Thomas Lapierre and Rebecca Roy being under the legal duty to provide necessaries for the said child, whereby the life of said child was endangered and her health permanently injured, and did, during the said period of time, cause grievous bodily harm to the said child, Céline Lapierre, by omitting without lawful excuse, to give her the necessaries of life, by keeping her in a place unfit for human habitation, by exposing her to cold, by beating her, by burning her tongue, and by forcing peas into her nostrils, the whole with intent to bring about the death of the said child, and to commit murder."

The Criminal Code of Canada provides as follows :—

210. Every one who as parent, guardian or head of a family is under a legal duty to provide necessaries for any child under the age of sixteen years is criminally responsible for omitting, without lawful excuse, to do so while such child remains a member of his or her household, whether such child is helpless or not, if the death of such child is caused, or if his life is endangered or his health is or is likely to be permanently injured, by such omission.

215. Every one is guilty of an indictable offence and liable to three years' imprisonment who, being bound to perform any duty specified in sections two hundred and nine, two hundred and ten and two hundred and eleven, without lawful excuse neglects or refuses to do so, unless the offence amounts to culpable homicide.

232. Every one is guilty of an indictable offence and liable to imprisonment for life, who does any of the following things with intent to commit murder ; that is to say—

(a) administers any poison or other destructive thing to any person, or causes any such poison or destructive thing to be so administered or taken, or attempts to administer it, or attempts to cause it to be administered or taken ; or

(b) by any means whatever wounds or causes any grievous bodily harm to any person ; or . . . . .

(h) by any other means attempts to commit murder.

611. Every count of an indictment shall contain, and shall be sufficient if it contains, in substance a statement that the accused has committed some indictable offence therein specified.

2. Such statement may be made in popular language without any technical averments or any allegations of matter not essential to be proved.

3. Such statement may be in the words of the enactment describing the offence or declaring the matter charged to be an indictable offence or in any words sufficient to give the accused notice of the offence with which he is charged.

4. Every count shall contain so much detail of the circumstances of the alleged offence as is sufficient to give the accused reasonable information as to the act or omission to be proved against him, and to identify the transaction referred to : Provided that the absence or insufficiency of such details shall not vitiate the count.

5. A count may refer to any section or subsection of any statute creating the offence charged therein, and in estimating the sufficiency of such count the court shall have regard to such reference.

6. Every count shall in general apply only to a single transaction.

At the trial no proof of filiation was made and the age of the child was not proved. The acts of cruelty were fully established, but the learned Crown Prosecutor sought to go beyond the charges made, and to fortify the case, endeavored to establish that defendants had been cruel to Hozanna Lapierre, another child of the male defendant. The Crown ruled that this evidence was inadmissible as irrelevant to the issues. (Taylor on Evidence, vol. 1, 9th ed. page 235, sect. 326).

The Crown, in cross-examination of the female prisoner, questioned her as to her treatment of Hozanna Lapierre. His Honor notified the Crown counsel, in allowing the question, that the answer of the prisoner, examined as a witness on this fact foreign to the issue, must be accepted as final. Rebecca Roy swore that she had never acted cruelly towards

Hozanna, her step-son. Later, in rebuttal, the Crown put the boy Hozanna into the witness box, to contradict the female prisoner, and the Court, relying upon the authority of Taylor on Evidence, 9th edition, page 947, vol. 2, sec. 1435, refused to allow the boy to testify. Taylor says: "The answer of a witness respecting any fact irrelevant to the issue will be conclusive, and no such question can be put to a witness on cross-examination, for the mere purpose of impeaching his credit by contradicting him."

The evidence being closed, Mr. Bélanger, counsel for the prisoners, moved that they be discharged, inasmuch, as no filiation had been proved and the age of the child had not been established. In answer Mr. Broderick, for the Crown, urged that it was of no moment in this case, that the Crown was not relying for the conviction of the prisoners upon articles 210 and 215 of the Criminal Code, that article 232 covered the case and upon that, and that alone, was the prosecution based. The Court ordered the defence to proceed, and after the addresses of counsel for the defence and for the Crown, His Honor charged the jury, that it was their duty to ignore the question of filiation which had not been established; he further instructed them, that the age of the child had not been proved, and they must, therefore, deal with the case upon the charge of intent to murder, and to render their verdict upon the sufficiency of the evidence adduced, as to whether the prisoners were guilty or not, of having done the acts charged against them, and if they considered the acts proved, had prisoners committed them, with intent to bring about the death of Céline Lapierre, and thereby to commit murder, or, merely, to commit some one of the offences included in such a charge, all of which His Honor fully explained.

The jury brought in a verdict against both prisoners of guilty with intent to commit murder, but with a recommendation to the mercy of the Court.

Thereupon Mr. Bélanger, Q.C., their counsel, presented the following motion:

Motion by and on behalf of the accused that the Court do

reserve for the consideration of the Judges of the Court of Queen's Bench for Crown cases reserved the following points of law raised by the defence, to wit :

1. Upon the question, whether the said conviction was made and is based upon Articles 210 and 215 of the Criminal Code of Canada, or under Article 232 of the said Code.

2. Upon the application made by the defence, during the trial, that the Court do instruct the jury to discharge the accused parties upon the ground that no legal evidence had been adduced by the Crown in support of the offence or offences as charged in the indictment.

3. Upon the question, whether the offence as laid in the indictment under the said Articles 210 and 215 of the said Code, and the offence, as laid in the indictment under article 232 of the said Code, could be included and laid in one and the same indictment.

4. Upon the question, whether the offence, as laid in the indictment under the said Articles 210 and 215 was and is a distinct and specific offence, and as such could and can be joined with the offence as laid in the indictment under the said article 232 of the said Code.

5. Under the question whether it was essential to prove by legal evidence the age of the said child in support of the offence or offences as laid in said indictment.

6. Upon the question whether the Court, now here, having ruled upon the application of the accused parties therefor, that the case should go to the jury exclusively upon the charge, as laid in the indictment under the said article 232, without having previously caused the said indictment to be amended accordingly, a verdict of guilty could be rendered by the jury upon the said indictment generally without specifying the offence.

7. Upon the question whether the said verdict of guilty could be rendered without any legal proof of the filiation of the said child. No certificate of baptism having been filed in this cause to prove that the said child is the daughter of the said Thomas Lapierre as required by article 228 of the Civil Code of this Province.

8. Upon the question whether the grievous bodily harm alleged in the said indictment having been caused under the evidence, through neglect on the part of the accused parties, to the said child, a verdict of guilty of the offence contemplated under article 232 of said Code could be rendered against them.

9. Upon the question whether evidence—adduced in support of the offence as laid in the said indictment under articles 210 and 215 of the said Code could be received in support of the charge contemplated by and as laid in the indictment, under the said article 232 of the said Code.

10. Upon the question whether this Honorable Court could instruct the jury to bring a verdict of guilty against the accused parties upon the indictment as laid under article 232 of the said Criminal Code.

11. Upon the question whether the accused parties can be sentenced under the said verdict and upon the said conviction to imprisonment for a period not exceeding ten years, or to imprisonment exceeding a period of three years.

12. And further that this Honorable Court now here do postpone judgment upon the conviction herein until the question shall have been decided.

SHERBROOKE, October, 1897.

CURRAN, J.—

The Court, having heard prisoners by their counsel, L. C. Bélanger, Esq., Q.C., and the Honorable the Attorney-General, by his duly authorized representative, J. S. Broderick, Esq., advocate, upon a motion on behalf of the said prisoners, for a reserved case, for the consideration of Her Majesty's Court of Appeals of this Province, upon the grounds mentioned therein, and that sentence be not pronounced until said grounds so reserved be adjudicated upon by the said Court of Appeals;

Considering that the indictment attacked is sufficient in law to warrant a conviction thereupon for attempt to murder, as provided by Article 232 of the Criminal Code;

Considering that Articles 210 and 215 were not relied upon in this case, and in no way affect it;

Considering that the indictment charges the accused with having done certain acts with intent to bring about the death of one, Céline Lapierre, and thereby to commit murder ;

Considering that under such an indictment it is not necessary to allege or prove the filiation or age of the said Céline Lapierre ;

Considering that the indictment is in plain language, sufficient to give the accused notice of the offence with which they are charged as provided by Article 611, Sec. 3, of the Criminal Code, that they pleaded not guilty to the said indictment, and that even admitting the said indictment to be multifarious, such defect in form is not fatal, as provided for by Article 611 of said Criminal Code ;

Considering that, as alleged in the sixth reason of said motion, the undersigned presiding judge at the trial in this cause, ruled that the said case should go to the jury exclusively upon the charge of attempt to murder, and further considering that the said presiding judge charged the said jury that the said jurors should not consider any charge under Articles 210 and 215 for various reasons, and amongst others, because the age of the said Céline Lapierre had not been proved.

Considering that the representative of the Honorable the Attorney-General prosecuting declared, in the presence of the accused and of the Court and jury, that the prosecution was not based in any way upon Articles 210 and 215 Criminal Code.

Considering that the application of the prisoners' counsel that they be discharged for want of proof of the charge made against them was properly dismissed during the said trial.

Considering that the judge presiding at said trial distinctly charged the jury that they must ignore the said Articles 210 and 215, and render their verdict upon the sufficiency of the evidence adduced as to whether the prisoners were guilty or not of having done the acts charged against them, with intent to bring about the death of Céline Lapierre and thereby to commit murder, or to commit some one of the offences included in such a charge as was fully explained by the said judge in his charge ;

Considering that all the proceedings in the said trial were legal in every respect ;

Doth dismiss the said motion.

An application was subsequently made on behalf of the prisoners to the Hon. the Attorney-General of the Province of Quebec for an order to grant a reserved case, and on the 8th November, 1897, his decision was given refusing the application.

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[HIGH COURT OF JUSTICE, ONTARIO.]

BEFORE MEREDITH, C.J., ROSE AND MACMAHON, JJ., SITTING AS A DIVISIONAL COURT.

**THE QUEEN v. FITZGERALD.**

*Quashing conviction—Status of prosecutor—No lapse on death of informant—Appeal to Sessions—Cr. Code 880.*

1. Where an order *nisi* to quash a conviction has been issued, but before service of same upon the informant prosecutor the latter died, the proceedings do not lapse and can be properly continued by serving the magistrates.
2. The informant in *certiorari* proceedings in criminal matters is not a party to the record although his name appears and although he is under liability for costs and has given a recognizance for same.
3. *Semble*, upon quashing a conviction in such a case, no cause of action in respect of its illegality survives against the representatives of the deceased informant.
4. *Semble*, an appeal under Cr. Code, 880, to the General Session would not abate under similar circumstances.

ARGUED : January 12, 1898.

DECIDED : February 14, 1898.

This was a motion to make absolute an order *nisi* to quash a conviction made by two justices of the peace for the district of Parry Sound for cutting a quantity of pulp wood.

After an order *nisi* had been granted to shew cause why the conviction should not be set aside, on the ground of its invalidity, the informant, who was the prosecutor, died,

before service on him of the order, but service had been made on the magistrates.

On January 12th, 1898, before a Divisional Court composed of MEREDITH, C. J., ROSE and MACMAHON, JJ., on moving to make the order absolute *Douglas Armour* who supported the motion called the attention of the Court to the fact of the death of the prosecutor; he contended that the death did not put an end to the proceedings, and referred to: *Regina v. Truelove*, 1880, 5 Q. B. D. 336; Paley on Convictions, 7th ed., 379.

No one shewed cause.

[The Court were of the opinion that the conviction could not be supported; but reserved judgment on the question as to the effect of the death of the prosecutor.]

TORONTO, February 14, 1898.

The judgment of the Court was delivered by

ROSE, J.—

This was a motion for an order absolute to quash a conviction on grounds stated. We were of the opinion that neither the information nor the conviction disclosed any offence known to the law, that the evidence disclosed no offence and that the conviction was not sustainable.

The order *nisi* had not been served upon the complainant, he having died after the granting of the order and before the service. It was served upon the justices. No one shewed cause.

Our attention was properly called by Mr. Armour to the fact of the death of complainant, and that the order *nisi* had not been served upon him, and we reserved judgment to consider whether the death of the complainant and the want of service made any difference. I think it is clear that it did not. In *The Queen v. Justices of Leicestershire* 1850, 15 Q.B. 88, it was held that an appeal from an order in bastardy should have been heard by the justices, notwithstanding the death of the woman before notice to her was posted. The Sessions were of the opinion that the condition imposed by statute 8 & 9 Vict. ch. 10, sec. 3, as preliminary to appeal



not having been complied with, they had no right to hear the appeal. The Court held on demurrer to the return to the mandamus to enter appearance and hear the appeal, that the performance of the condition imposed by statute having by act of God become impossible, its performance was excused and a peremptory mandamus was awarded. If this case had been heard under our statute by way of appeal it would have been sufficient to have given notice to the respondent or to the justice who tried the case : see sec. 880 of the Criminal Code.

In *The Queen v. Truelove* 1880, 5 Q. B. D. 336, after the issue of a summons on a complaint that obscene books were kept by the defendant in his shop for sale, and before the hearing, the complainant died and no application was made to substitute another complainant. The Court held that the proceedings against the defendant did not lapse upon the death of the complainant, and that the order was valid.

In *The People v. Nixon* 1867, 45 Ill. 353, it was held that the death of the mother did not abate bastardy proceedings commenced during the life of the mother. The Court there said : "The mother is not a party to the record, although allowed to control the suit, and may be liable for costs in case the defendant is discharged. The mother not being a party, there is no technical reason for the abatement of the suit. Its prosecution may be more important to the public than if the mother had not died."

See also *The People v. Smith* 1885, 17 Ill. App. (Bradwell) 597 ; also *R. R. v. J. M.* 1825, 3 N. H. R. 135.

It is clear under our procedure that the informant is not a party to the record, although his name appears and in certain events he may be made liable for costs. It is also true that the security given on the motion for *certiorari* covers the costs of the informant in the event of any costs being ordered to be paid by the defendant to the informant. But this does not in any wise make the informant a party to the record. There is no particular reason why the informant should be represented upon this motion. Any cause of action which would have arisen upon the quashing of the conviction had the

informant been alive does not survive his death. The maxim *Actio personalis moritur cum persona*, applies.

The order must go quashing the conviction without costs, and there will be the usual order for protection of the justices.

MEREDITH, C. J., and MACMAHON, J., concurred.

**Note :**

*Criminal Proceedings—Death of Prosecutor—Whether ground for dismissal.*

In bastardy proceedings the general rule is that neither the death of the mother nor of the child is sufficient ground for dismissal. *People v. Smith*, 1885, 17 Bradwell (Ill. App.) 597.

The people have an interest in the prosecution after the death of the mother in order to save them from a possible support of the child, and the mother for the purpose of compelling reimbursement for advances. *Ibid.*

If however the power of the magistrates is by statute limited to cases where they have heard the evidence of the woman, and such other evidence as she may produce, and the evidence of the mother is required by the statute to be corroborated in some material particular before an order can be made, there is no jurisdiction to make an order without the testimony of the mother. *Jessop v. Brierley*, 36 J.P. 488; and if she die before the hearing no order can be made. *R. v. Armitage*, L.R. 7 Q.B. 773.

The party who originally made the complaint need not always continue to be the party respondent to the appeal taken against the conviction; and some other person may take up the prosecution upon the complainant's death and may be held liable to pay costs if the appeal should be successful. Per. Lush, J., *R. v. Truelove*, 1880, 5 Q.B.D. 336, 340.

## [SUPREME COURT OF NOVA SCOTIA.]

BEFORE McDONALD, C.J., RITCHIE, AND TOWNSHEND, JJ.,  
AND GRAHAM, E.J.

## THE QUEEN v. HALIFAX ELECTRIC TRAMWAY CO.

*Lord's Day observance—Provincial Criminal law before confederation of the provinces—British North America Act—Ultra vires amendments.*

- 1 A. Provincial statute relating to criminal law passed before Confederation becomes as to that province a part of the criminal law of Canada, and is subject to repeal or amendment by a Dominion statute only.
2. If it appears that provincial legislation deals with public wrongs and imposes penalties in respect thereof for the enforcement of which all citizens should have an equal interest as distinguished from enactments passed for the protection of a particular class or the regulation of the dealings or business of a certain class, as for example between master and servant, such legislation as to public wrongs is within the exclusive jurisdiction of the Dominion Parliament, although similar legislation as applied to various classes only and not to the public generally would be within provincial jurisdiction as dealing with "civil rights."
3. A Sunday observance law of Nova Scotia passed before Confederation which applied to individuals only, cannot be amended by the legislature of that province so as to apply to corporations, and a provincial Act purporting to so amend was held to be ultra vires.

ARGUED : December 16, 1897.

DECIDED : January 11, 1898.

This was an application on behalf of the defendant company for a writ of prohibition to restrain the Stipendiary Magistrate of Halifax from proceeding to adjudicate upon a complaint made before him against the defendant company, charging them with a violation of R. S., Nova Scotia, (third series) c. 159, in that the company directed and permitted a motor man, one of their servants, to perform servile labour in the City of Halifax on Sunday, by operating a tram car owned by the company upon and along the streets of the said city, and by carrying passengers in the car and performing the duties of a motorman in connection therewith, such labour being servile labour within the meaning of the said statute, as amended by c. 32 of the Acts

of Nova Scotia, 1891, and not being a work of necessity or mercy within the meaning of such statute.

Prior to 1867 c. 159 of the Revised Statutes of Nova Scotia (3rd series) was part of the criminal law of the province.

By the British North America Act the criminal law was placed within the exclusive legislative authority of the Parliament of Canada, which authority was exercised in respect of c. 159 by the repeal of two of its sections.

Sec. 2, which was not repealed, was as follows : " Any person who shall be convicted before a justice of the peace, etc., of servile labour, works of necessity and mercy excepted, on the Lord's Day shall for every offence forfeit, etc."

By the Provincial Acts of 1891, c. 32, it was sought to amend this provision of c. 159 by enacting that " a body corporate employing or directing any person to perform servile labour on Sunday is guilty of performing servile labour on Sunday within the meaning of the second section of the principal Act and is liable," etc.

*W. H. Covert* and *H Mellish* for the defendant company.

*R. L. Borden*, Q.C., and *J. A. Chisholm* for the Crown.

HALIFAX, January 11, 1898.

GRAHAM, E. J.—

Before the British North America Act was passed we had in the Revised Statutes (3rd series) under the part relating to the Criminal Law and the Administration of Criminal Justice, a chapter entitled " Of Offences Against Religion." Some of the provisions were repealed by the Parliament of Canada, having found a place in the body of criminal law. Three sections were not repealed or re-enacted. S. 2 is as follows : " Any person who shall be convicted before a justice of the peace of shooting, gambling or sporting, of frequenting tippling houses or of servile labour, works of necessity and mercy excepted, on the Lord's Day, shall for every offence forfeit not less than one, nor more than eight dollars, and in default of payment shall be committed to jail for a term of not less than twelve hours nor more than four days."

There has been legislation purporting to be amendments of this provision passed by the Provincial Legislature, viz.: 1889, c. 5; 1890, c. 22; 1891, c. 32. And by the last of these a natural person or body corporate employing or directing any person to perform servile labour on Sunday is guilty of performing servile labour on Sunday within the meaning of the second section of the principal Act, and is liable to penalty, etc.

The first question, I think, is whether the second section relates to a subject coming within "property and civil rights" under s. 92, or within "the criminal law" under s. 91 of the British North America Act. Is it aimed at a public wrong, or is it a "shall not" in respect to civil rights? Of course the imposition of a penalty means little. Both Legislatures may impose penalties for the enforcement of their laws by the express terms of the Act. The applicants for the writ of prohibition contend that the subject of this legislation could alone be dealt with by the Dominion Parliament and that the original Act could not now, and the amendments as well could not, be passed by the Provincial Legislature. Hence that the amendments under which the information is laid are ultra vires.

Statutes of this character are common in the United States, and they are held to deal with Sunday as a civil institution, and to be a proper exercise of the police power of the State to promote the mental, moral, and physical well-being of the people by providing that they shall rest a seventh part of their time from labour, and at regular intervals. I only refer to these laws to ascertain, if possible, what is the proper head to put such statute under in this country.

Blackstone, vol. 4, p. 63, not only treats of Sunday as a civil institution, but, as would be expected, in England, also from the standpoint of religion or morals. He has a chapter "Of Offences against God and Religion," and, under it, a head, "Profanation of the Lord's Day, vulgarly but improperly called Sabbath-breaking." There he refers to early English statutes, the parent of some of the American statutes as well as our own.

Many text writers follow this classification. In Bishop on Criminal Law, vol. 2, sec. 951, it is even suggested that the violation of the Lord's Day was indictable at common law. In 1 Chit. Crim. Law 20, there is a form of indictment at common law against a Sabbath breaker and profaner of the Lord's Day in keeping open shop. But it proceeds on the ground of nuisance, and would not cover the offences mentioned in this Act. In the Criminal Code of Canada there is a title, "Offences against religion, morals, and public convenience." Of course it is difficult to draw the line in respect to legislation relating to civil rights and relating to public wrongs. But if it can be shown to be dealing with public wrongs, then it is removed from the head of civil rights.

It seems to me that there is authority on the point—a dictum in *Russell v. The Queen*, 7 App. Cas. 829. I venture to refer to it, although it appears that courts of first instance have generally had the misfortune to misunderstand any citations that they have ever made from that case :

"Next, their Lordships cannot think that the Temperance Act in question properly belongs to the class of subjects, 'Property and Civil Rights.' What Parliament is dealing with in legislation of this kind is not a matter in relation to property and its rights, but relating to public order and safety. Upon the same considerations the Act in question cannot be regarded as legislation in relation to civil rights. In however large a sense these words are used, it could not have been intended to prevent the Parliament of Canada from declaring and enacting certain uses of property, and certain acts in relation to property to be criminal and wrongful."

This is the dictum : "Laws which make it a criminal offence for a man wilfully to set fire to his own house on the ground that such an act endangers public safety, or to overwork his horse on the ground of cruelty to animals though affecting in some sense property and the right of a man to do as he pleases with his own, cannot properly be regarded as legislation in relation to property or to civil rights. Nor could a law which prohibited or restricted the sale or exposure of cattle having a contagious disease

be so regarded. Laws of this nature designed for the promotion of public order, safety, or morals, and which subject those who contravene them to criminal procedure and punishment, belong to the subject of public wrongs, rather than to that of civil rights. They are of a nature which fall within the general authority of Parliament to make laws for the order and good government of Canada, and have direct relation to criminal law, which is one of the enumerated classes of subjects assigned exclusively to the Parliament of Canada."

In *Regina v. Wason*, 17 Ont. App. 221, a provincial statute prohibiting under a penalty any person from selling adulterated milk to owners of a cheese or butter factory was held to be *intra vires*. But Street, J., whose opinion was upheld in the Court of Appeal, said: "Is it an Act constituting a new crime for the purpose of punishing that crime in the interests of public morality, or is it an Act for the regulation of the dealings and rights of cheese makers and their patrons with punishments imposed for the protection of the former? If it is found to come under the former head, I think it is bad as dealing with criminal law. If under the latter, I think it is good as an exercise of rights conferred on the province by sec. 92 of the B. N. A. Act." This observation was approved of in the Court of Appeal.

Testing this section by it I think it falls within the criminal law. Possibly the Provincial Legislature might approach it by enacting a law about masters and servants, and another about winners and losers in gambling, giving the one as against the other a rest on one day in the week, and so on, and thus bring the legislation under the head of civil rights, as the statute about vendors and vendees of milk was brought. But this provision is not passed about such rights at all; it is dealing with things which the legislature regarded as injurious to the public—not the rights of individuals inter se, but the right of the community not to have its citizens demoralized, whether they are those who engage in shooting, gambling, sporting, tippling, or working on Sunday, or those who are obliged to witness these things. One private citizen

has no more interest than another in seeing it enforced. It is aiming at something analogous to public nuisances, and concerns the public.

There is another head to be looked at. If this provision was passed in the interest of the public no reason has been suggested why it is not as suitable or as applicable to the condition of things in other provinces as in Nova Scotia. It would not, therefore, be considered a "matter of a merely local or private nature in the province." The field has been occupied, if this is criminal law in so far as the Province is concerned, and there is no reason for applying provincial legislation as a temporary expedient, because of any particular local iniquity under the new doctrine of the Judicial Committee of the Privy Council.

Coming to the amendments, I suppose the Province might pass legislation in regard to this matter, and perhaps secure the same end under the head "property and civil rights" or some other head. But it appears to me that the Act, 1891, c. 32, is not an attempt to do this. It is a bona fide attempt to amend by adding sections to an Act which I have just endeavored to show is a part of the criminal law. The first section expressly says so. Moreover the person who offends by employing, hiring or procuring his employee to perform servile labour is declared "guilty of performing servile labour on Sunday within the meaning of the second section of this Act," i.e. the principal Act. It is an attempt to deal with the criminal law—to make an offence equal to a crime that the Parliament of Canada alone could create.

In my opinion the prohibition ought to issue to prevent the prosecutor from proceeding under these supposed amendments.

RITCHIE, J.—

Previous to 1867, c. 159 of the Revised Statutes (3rd series) was part of the criminal law of Nova Scotia. The whole of that series is contained in one Act, the different chapters being grouped together under specific divisions, or parts, and titles, which are, I think, part of the Act. (See p. 1 and s. 1 of c. 170, at p. 680). In this Act or revision



c. 159 is placed with all the other criminal statutes then in force in part 4, which is entitled "Of the Criminal Law, and the Administration of Criminal Justice," and in the subdivision or title xli, which is entitled "Of Offences against the Government."

By the North British America Act the criminal law of this province was placed within the exclusive legislative authority of the Parliament of Canada, and that authority was exercised in respect of this chapter in 1869, when the Parliament of Canada repealed two of its sections. Revised Statutes of Nova Scotia (3rd series), c. 159, being part of the criminal law, the local legislature of Nova Scotia had, in my opinion, no power to alter or amend any of its sections, and any legislation purporting to have that effect is ultra vires the Local Legislature. I wish to be distinctly understood as giving no opinion as to whether the Local Legislature could or could not, by any legislation, prevent the performance of servile or other labour on Sunday, but I think it cannot be done in the way attempted—that is, by trying to amend the criminal law. The stipendiary magistrate for the City of Halifax should be prohibited from convicting the Halifax Electric Tramway Company, Limited, for any breach of the acts of the Local Legislature of Nova Scotia, purporting to amend c. 159 of the Revised Statutes of Nova Scotia (3rd series), or any act in amendment thereof.

TOWNSHEND, J., concurred.

MCDONALD, C.J.—(dissenting.)

At the time of the Union, chapter 159 of the third series of the Revised Statutes of Nova Scotia entitled "Of Offences Against Religion" was in force. In 1869 the Parliament of Canada amended this statute by repealing the first and third sections thereof, leaving the law as now printed in the fifth series of the Provincial Statutes.

By this last recited statute :

"Any person who shall be convicted before a justice of the peace . . . of servile labour (works of necessity and mercy excepted), on the Lord's Day, shall, for every

offence, forfeit not less than one nor more than eight dollars, and, in default of payment, shall be committed to jail for a term not less than twelve hours nor more than four days."

This statute is still law, not only by force of Provincial Legislative authority, but by the higher sanction and authority of the Imperial Parliament, and I know of no authority which can question its validity and force as a local law of this province, except only the Parliament of Canada or the Legislature of Nova Scotia.

"According to the authority of the parliament or of that legislature," under the B.N.A. Act, it remains, while unrepealed, the law of Nova Scotia "as if the union had not been made;" and the provincial judicial functionaries would, in my opinion, have complete jurisdiction to adjudicate upon a complaint charging a violation of the Act.

It cannot be subject to the objection that it is *ultra vires* the legislative powers of the local legislature, because it was the law of the province before the Union, and by virtue of the Imperial Act, continues the law of the Province as if the Union had not been made, until abrogated or altered as provided by that Act.

It is said, however, that certain amendments to chap. 159 have been enacted by the local legislature which are beyond their legislative authority.

The first of these amendments at all material, was made by chap. 57 of the Provincial Acts of 1889. This statute is purely one of procedure. It does not create any new offence. By the first section the penalty for the offence against chap. 159 is slightly increased, and especially the penalties to be incurred by corporations. The second section is merely an interpretation clause defining the meaning of the word "person," in the original Act, a precaution entirely unnecessary in view of what I shall presently state. The remaining clauses of the amending law will be seen on reference to the statute itself, to be purely directory as to procedure in the enforcement of the Act.

It is also objected that chap. 32 of the Acts of 1891, amending the principal Act is *ultra vires*. By section 7 it is

enacted that any person who employs others to do servile work on Sunday, or who permits or procures his servant to do so, is himself guilty of performing servile labour under the original Act.

That is not, in my estimation, the creation of a new offence. It is not quite clear that in point of law a prosecution for the offence described in this amending clause could not have been sustained under the original Act before the amendment was made ; that is, was not a man who ordered and procured his servants to do servile labour for him on Sunday guilty of a violation of the provisions of chapter 159? That is a question of law proper for the consideration of the magistrate on the trial, and I give no opinion upon it ; but that the magistrate has jurisdiction to hear and decide upon that, I have no doubt ; and that being so the order for prohibition cannot go.

Section 8 of chapter 32 of the Acts of 1891 simply repeats the same provision as to corporations, as provided in section 7 as to individuals and I need not repeat the observations I have already made.

The ground was not taken on the argument that c. 159 was ultra vires, nor can I see how such an argument could prevail, if my view is correct, that the statute, by reason of the legislation I have mentioned is a police or municipal law of the Province and nothing more. It is amendable both as to procedure and the imposition of penalties by the Provincial Legislature. I have been unable to perceive upon what principle the amending Acts I have referred to can be said to be ultra vires the authority of the Provincial Legislature. It is the duty of that Legislature to enforce all laws of the Province, c. 159 included, and to provide and regulate the machinery and procedure by which that can be done, for without rules of procedure applicable to the courts whose function it is to deal with the question involved, the law itself may be incapable of enforcement. The right of the Provincial Legislature to make such provisions, and to impose adequate punishment by fine or imprisonment under laws by which they had power to enact has long been settled by the highest

authority. I have said that the second section of the amending Act of 1889 was an unnecessary precaution because the Interpretation Act in the third series of the Revised Statutes containing c. 159, contains the same provision in almost identical words. "Persons may include bodies politic and corporate as well as individuals." See also *Pharmaceutical Society of London v. L. & P. Supply Association*, 5 App. Cases, at p. 561.

I have endeavoured to show that the Stipendiary Magistrate of Halifax has jurisdiction to enquire into and adjudicate upon a charge of an alleged violation of the principal Act, and that the amendments mentioned do not affect that jurisdiction.

The charge is that this defendant corporation procured and hired persons to do servile work for them and in their interests on the Lord's Day. I think the Stipendiary Magistrate of Halifax has jurisdiction to adjudicate upon that charge, and that, consequently, this application should be refused with costs.

I am not sorry that I feel obliged to come to this conclusion. The Parliament of Canada has made no provision with a view to enforce abstinence from ordinary labour and occupation on the Sabbath, leaving the subject in the case of Nova Scotia to be dealt with by the Local Legislature, and I should be sorry to see the sanction which our statute gives to the sacredness of the Sabbath withdrawn.

Prohibition granted.

## [HIGH COURT OF JUSTICE, ONTARIO.]

BEFORE BOYD, C., FERGUSON AND MEREDITH, JJ., SITTING  
AS A DIVISIONAL COURT.

**NEVILLS v. BALLARD.**

*Assault occasioning bodily harm—Civil action not barred by  
conviction—Cr. Code 262, 864, 866.*

1. A conviction upon a charge of assault occasioning bodily harm tried summarily by a magistrate with the consent of the accused and the undergoing of the punishment imposed do not constitute a bar to a civil action for damages for the assault.
2. Sec. 866. Cr. Code, applies to bar the civil action, only where the charge is triable summarily under sec. 864 without regard to the consent of the accused, and does not have that effect where the charge is under sec. 262 for the indictable offence of assault causing actual bodily harm.

ARGUED : October 6, 1897.

DECIDED : October 7, 1897.

Motion to the Divisional Court by way of appeal from the judgment of ARMOUR, C.J., delivered on April 27th, 1897, directing judgment to be entered for the plaintiffs for \$250 and costs, in this action, which was brought by father and son for damages for an assault alleged to have been committed on the latter.

The main ground for appeal was that the evidence shewed that the plaintiffs preferred a complaint against the defendant charging him with having assaulted the son, and after hearing the complaint the police magistrate convicted the defendant and he was fined \$20 and \$17 costs, which he paid, and that this payment released the defendant from all further or other proceedings, civil or criminal, under section 866 of the Criminal Code.

The conviction before the police magistrate, before whom the defendant had consented to be summarily tried, was "for that the said George Ballard," the defendant, "on February 6th, 1895, at and in the said city of Hamilton, did unlawfully assault Richard Nevills and thereby occasion him actual bodily harm."

The Criminal Code, 1892, provides as follows :

262. Every one who commits any assault which occasions actual bodily harm is guilty of an indictable offence and liable to three years' imprisonment.

864. Whenever any person unlawfully assaults or beats any other person, any justice may summarily hear and determine the charge, unless at the time of entering upon the investigation the person aggrieved or the person accused objects thereto.

2. If such justice is of opinion that the assault or battery complained of is, from any other circumstance, a fit subject for prosecution by indictment, he shall abstain from any adjudication thereupon, and shall deal with the case in all respects in the same manner as if he had no authority finally to hear and determine the same.

866. If the person against whom any such complaint has been preferred, by or on the behalf of the person aggrieved, obtains such certificate, or, having been convicted, pays the whole amount adjudged to be paid, or suffers the imprisonment, or imprisonment with hard labor, awarded, he shall be released from all further or other proceedings, civil or criminal.

*Riddell*, for the defendant. The sole point is, does an action for assault lie under the Code. It is *Flick v. Brisbin*, 26 O. R. 423, over again. The magistrate can try summarily unless the complainant objects. R.S.C. ch. 178, sec. 73, gives the old law which is changed by section 864 of the Criminal Code, 55-56 Vict. ch. 29 (D.)

*Mulvey*, for the plaintiff. This was a complaint for an aggravated assault under section 262 of the Criminal Code. It was tried under the summary trial section by consent of the accused, and was not a case of common assault. That may be disposed of by indictment or summarily by a justice of the peace. A summary conviction can only be had where specially provided for, which it is not in this case : section 840. The certificate here does not debar us from suing for damages ; section 799 of Code applies upon the summary

trial of indictable offences, under part 55. It was under sections 782-805 that the Judge in our case had jurisdiction.

[*Riddell*. There was no certificate here. The conviction is sufficient.]

The conviction is not covered by section 856 ; but section 799 is what applies here. *Marchessault v. Gregoire*, 4 Rev. Leg. 541, is almost on all fours. I refer also to *Holden v. King*, 46 L. J., (Q. B.) N. S. 75 ; *The Queen v. Miles*, 24 Q. B. D. 423 ; *Emerson v. Niagara Navigation Co.*, 2 O. R. 528.

*Riddell*, in reply. If neither party objects, why should not a magistrate have the right to try even an aggravated assault ? Section 864, sub-sec. 2 of the Criminal Code, 55-56 Vict. ch. 29, directs the magistrate to abstain when he thinks it proper that the proceeding should be by indictment. Under the present statute he can proceed even though the assault be accompanied by an attempt to commit a felony. Nothing in part 55 affects the jurisdiction of a magistrate acting under another part of the statute. Here he may have been acting under section 864.

TORONTO, October 7th, 1897.

BOYD, C.—

*Flick v. Brisbin*, 26 O. R. 423, was argued upon the constitutionality of sections 865 and 866 of the Criminal Code, 55-56 Vict. ch. 29 (D.). It was assumed that the conviction for assault, though with aggravating circumstances, proceeded by way of summary jurisdiction under sections 864. The point now raised (if it was tenable there) was not presented for adjudication, viz., that the assault was one under section 262, causing actual bodily harm, and not susceptible of being tried summarily under part 58 of the Criminal Code. It appears that the complaint in this case was for an indictable offence, which was brought under part 55 of the Code by the election of the person charged, who, under section 786, consented to be tried summarily. The effect of a conviction under this part is that the person convicted is released from all further or other criminal proceedings for the same cause :

section 799 of the Criminal Code. But it does not go as far as the conviction under sections 864-866, which bars further civil as well as criminal proceedings.

The point in the present appeal, therefore, is not governed by the decision in *Flick v. Brisbin*, and that case was rightly distinguished by the learned Chief Justice at the trial, and his judgment should be affirmed with costs.

FERGUSON and MEREDITH, JJ., concurred.

**Note :** See also the next case.

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[QUEBEC SUPERIOR COURT FOR THE DISTRICT  
OF MONTREAL.]

BEFORE ARCHIBALD, J.

**HARDIGAN v. GRAHAM.**

*Aggravated Assault—Civil Action Barred by Conviction—Cr.  
Code 262, 783 (c), 864, 866.*

1. A conviction upon a charge of aggravated assault tried by a magistrate under sec. 783 (c) of the Criminal Code, with the consent of the accused, and the payment of the fine thereby imposed, will constitute a bar to a civil action for damages for such assault.
2. The word "assaults" in sec. 864, Cr. Code, which authorizes a summary trial, unless the person aggrieved or the person accused objects, must be taken to include aggravated as well as common assaults.
3. The injury to clothing or loss of property from the person by reason of the assault does not constitute a cause of action distinguishable from the civil action for assault, and any claim in respect of such injury or loss will likewise be barred where sec. 866 Cr. Code applies.

MONTREAL, November 9, 1897.

ARCHIBALD, J.—

The plaintiff sues for the recovery of \$190 for damages which he alleges he has suffered by reason of an assault committed upon him by defendant, by means of which he lost a breast pin which he values at \$25 ; was obliged to pay \$5 for medical attendance, \$15 for legal costs and besides suffered severely from the effects of the assault. Plaintiff further



alleges that he caused the defendant to be arrested upon an information charging him with aggravated assault and that upon such information defendant was condemned to pay and did pay a fine of \$10 and costs.

Defendant, among other things, pleads that the conviction before the Magistrate and the payment by him of the amount of the fine imposed was a bar to any subsequent prosecution for the same cause, whether civil or criminal, and defendant cites Arts. 864 and 866 of the Criminal Code.

Art. 864 is as follows: "Whenever any person unlawfully assaults or beats any other person, any justice may summarily hear and determine the charge, unless at the time of entering upon the investigation the person aggrieved or the person accused objects thereto. 866, If the person against whom any such complaint has been preferred by or on behalf of the person aggrieved obtains such certificate (certificate of dismissal of complaint provided for by Art. 865), or having been convicted pays the whole amount adjudged to be paid, or suffers the imprisonment or imprisonment with hard labour, awarded he shall be released from all further or other proceedings, civil or criminal, for the same cause."

It is then clear that if the defendant comes within the provisions of this clause, the plaintiff's action must fail. But plaintiff says, (1) the word "assaults" contained in section 864 must be taken as meaning "common assaults," and that it does not include "aggravated assault" such as was charged against the defendant before the Magistrate.

(2) That while part of the claim made against defendant may be for the "same cause" as the criminal prosecution, part of it is for a different cause and pro tanto, plaintiff is not barred.

Plaintiff supports his argument in favour of the restricted interpretation of the word "assault," by tracing the history of clause 866 back through various enactments to the Consolidated Statutes of Canada, where it is alleged to have been made expressly applicable to common assaults. As to the effect of this consideration, I will have an observation to make below. In the meantime I shall try to interpret the word in

connection with the other provisions of the Statute where it is found.

The clauses calling for interpretation belong to a series of clauses beginning with 839, referring to summary convictions before magistrates, and would, *prima facie*, at any rate, include all cases, susceptible of summary trial. Art. 861, which immediately precedes the clause in question, makes special reference to summary convictions before a justice for any offence against the provisions of Part XX (among others) of the Criminal Code. This part contains the articles relating to assaults of every description, and among others those styled "aggravated assaults," as well as those styled "common assaults." A curious thing is that section 862, referring to section 861, makes an acquittal or conviction a bar to any "subsequent information or complaint for the same matter," nothing being said concerning the bar of the civil remedy. It seems strange at first sight that sections 864 and 866, treating also of assaults, should establish a somewhat different rule. On consulting the Revised Statutes of Canada, secs. 55 and 56, which are the foundation of Arts. 861 and 862, I find that assaults are not included at all, but only offences against the Larceny Act, "The Act respecting Malicious Injuries to Property" and "The Act respecting the Protection of the Property of Seamen in the Navy." It is not, however, necessary to suppose that the Parliament, in enacting the Criminal Code, inadvertently included it under the provisions of 861 and 862 more than was intended, or that the whole matter of assaults included in Art. 861 is not also included under 864. Art. 861 has a different scope from 864. It provides for the case of a first offence, or for a conviction for an offence, under such circumstances, as to induce the justice to conclude that leniency may be rightly exercised upon such evidences of good intention on the part of the offender as arise from the fact of his having made satisfaction to the person injured. It concerns the offender in relation to society. Art. 864 and 866, on the other hand, concern the offender in his relation to the person aggrieved. It will be noticed that it is only a complaint "by or on behalf of" the person aggrieved, which has the effect of barring civil proceedings. The person

aggrieved has in such cases the option of proceeding before the Civil Courts, for the recovery of damages or of laying an information before the Criminal Courts. If he takes the latter course he must content himself with such judgment as shall be pronounced in that Court. He has by implication waived his civil remedy. Art. 783c of the Criminal Code makes aggravated assault triable summarily by the Magistrate. As to the provision of the Consolidated Statutes of Canada, barring the civil remedy after an offender has been tried criminally for common assault, I would remark that, at that date, the provisions for summary trial without indictment were much more restricted than at present. These summary trials are to a much greater extent a matter between the person charged and the person aggrieved than are trials upon indictment. Thus as the summary trial became more widely applicable, the barring of the civil remedy kept pace. In conclusion, I remark that the word "assaults" naturally includes aggravated as well as common assaults; that occurring where it does it must be taken to include all assaults over which the Magistrate had summary jurisdiction, and consequently, aggravated assaults; and that, therefore, the plaintiff's remedy is barred for "the same cause" as was in issue before the Magistrate.

The distinction which the plaintiff seeks to establish between the cause for which the conviction was made, and the cause which is now set up in the declaration is not, I think, well founded. The cause of the proceedings before the Magistrate included all the *res gestæ* surrounding the offence with which the defendant was charged, so far at any rate as they related to any species of violence to the person of the prosecutor. I do not say that if the plaintiff's declaration had alleged anything of the nature of a larcency or an appropriation by the defendant of plaintiff's scarf pin, that his remedy for that would have been barred. A criminal prosecution for larcency would not be barred by a conviction for aggravated assault, although the larcency was part of the *res gestæ* of the aggravated assault. But prosecution for an aggravated assault would be barred by a prosecution for common assault and vice versa. See *Reg. v. Elrington*, 9

Cox, C.C., p. 86. Held: "A certificate of the Justices of the dismissal of an information for common assault may be pleaded in bar to an indictment founded upon the same assault, though the assault in such indictment is alleged as having caused grievous bodily harm."

Cockburn, C.J., said: "Upon the facts as stated, it appears that there was an information before Justices for common assault. It was dismissed. The prosecutor then prefers an indictment in respect of the very same transaction. The defendant pleads the former information in bar. Now the Act of Parliament expressly enacts that when the Justices dismiss an information for a common assault, they may grant a certificate which is to be a bar to all further or other proceedings civil or criminal for the same cause (although circumstances of aggravation were alleged). It is a fundamental rule that out of the same facts a series of charges shall not be preferred."

So in the case of *Reg. v. Yean*, on an indictment for grievous bodily harm, the Judge refused to take a verdict for common assault, and the jury then bringing in a general verdict of "guilty," the Court on appeal declared it a mistrial. 9 Cox, C.C., 91.

In this case, all the facts of the assault were in issue before the Magistrate. The alleged losing of the breast-pin was a consequence or effect of the assault, but so far as defendant was concerned, was not a different or distinct offence. The defendant assaulted only. The effects were personal injury, perhaps injury to clothing, loss of property. It is impossible, however, to place these different effects of the defendant's act on a different footing. I am therefore of opinion that I cannot distinguish between the different items of the plaintiff's but must rule that the whole claim is barred.

This previous proceeding before the Magistrate was set forth in the plaintiff's declaration. The defendant could have demurred. I shall therefore dismiss plaintiff's action up to and including plea fyled. Subsequent costs divided, seeing defendant should have demurred.

Judgment for defendant.

**Note:** See the preceding case.

## [COURT OF QUEEN'S BENCH, MANITOBA.]

BEFORE TAYLOR, C.J., KILLAM AND BAIN, JJ., SITTING  
AS A COURT OF APPEAL FOR CROWN  
CASES RESERVED.

**THE QUEEN v. BUCHANAN.**

*Indictment—Irregularity—Failure of foreman of Grand Jury  
to initial names of witnesses—"Shall," meaning of—  
Assault—Consent to fight—Cr. Code 645.*

1. The provisions of the Criminal Code, sec. 645, requiring the foreman of the Grand Jury to initial upon the bill of indictment the names of witnesses sworn is directory only and not imperative.
2. An indictment should not be quashed because of the omission of the foreman in that respect.
3. A blow struck in anger or which is intended or is likely to do corporal hurt is a criminal assault, notwithstanding the consent to fight of the person struck.

ARGUED : May 10, 1898.

DECIDED : June 27, 1898.

At the spring sittings, at Portage la Prairie, the accused was arraigned before Dubuc, J., on an indictment charging an assault occasioning actual bodily harm. Before pleading his counsel moved to quash the indictment on the ground that the foreman of the grand jury had not, as required by section 645 of the Criminal Code, written his initials opposite the names of the witnesses examined before the grand jury. That section provides as follows : "645. The name of every witness examined, or intended to be examined, shall be endorsed on the bill of indictment ; and the foreman of the grand jury, or any member of the grand jury so acting for him, shall write his initials against the name of each witness sworn by him and examined touching such bill of indictment."

By the Interpretation Act, R.S.C., c. 1, s. 7 (4), it is enacted that the expression "shall" shall be construed as imperative and the expression "may" as permissive.

Dubuc, J., directed the case to proceed, reserving the

question raised for the opinion of the Court, and the accused was found guilty of common assault.

The questions reserved for the opinion of the Court were thus stated: (1) It being shown that the foreman of the grand jury had omitted to write his initials opposite the names indorsed on the back of the indictment of the witnesses who had been sworn and examined before the grand jury, was that omission fatal to the indictment, and should, on that account the indictment be quashed?

(2) Was my not instructing the jury that if they found that the complainant had consented to fight with the prisoner on the occasion when he complained of having been assaulted, there was no offence committed, a non-direction in point of law sufficient to invalidate the verdict?

*H. M. Howell, Q.C.*, for the accused. Section 645 of the Code provides that the foreman of the grand jury shall write his initials against the name of each witness sworn and examined. "Shall" is imperative: R.S.C., c. 1, s. 7, s-s. 4. The name of every witness to be examined during the trial must be on the indictment. See *Stephens' History of the Criminal Law*, vol. 1, pp. 273-4; 19 & 20 Vic. c. 54; *Short & Mellor's Crown Office Practice*, 182; *Roscoe's Criminal Evidence*, 11th ed. 177. The grand jury must proceed on evidence given before them: *Reg. v. Denby*, 2 Leach 580; *Reg. v. Dickinson*, 1 Russ. & R. 401; *Reg. v. Gordon*, 12 L. J. M. C. 84; *Reg. v. Beaver*, 10 Cox, 274; *Reg. v. Rendle*, 11 Cox, 209; *Reg. v. Wilson*, 12 Cox, 622; *Reg. v. Gerrans*, 13 Cox, 158; *Reg. v. Goodfellow*, 14 Cox, 326; *Reg. v. Russell*, 1 C. & M. 247; *O'Connell v. The Queen*, 11 C. & F. 190. Plea in abatement held bad because an indictment might have been found on evidence of witnesses who were sworn: *Scott v. The People*, 63 Ill. 508; *Andrews v. The People*, 117 Ill. 195; *Amer. & Eng. Ency. of Law*, vol. 1. p. 501; *Taschereau's Criminal Code*, 730.

*H. A. Maclean* for the Crown. It is not necessary that a witness be sworn in order to give testimony before a Grand Jury: *Regina v. Bullard*, 12 Cox, 353. Section 644 of The

Criminal Code merely provides that witnesses before a Grand Jury may be sworn and examined upon oath, but does not provide that their testimony must be given upon oath. In *Regina v. Dickinson*, Russ. & R. 401, it being discovered after conviction that witnesses had been before the Grand Jury without being sworn the Judge thought the objection came too late and sentenced the prisoner, and in *Regina v. Russell*, C. & M. 247, the Court refused to inquire whether the witnesses were properly sworn before the Grand Jury. 1 and 2 Vic., c. 37, provided that the foreman of the Grand Jury should put his initials opposite the names of witnesses sworn before the Grand Jury. That statute is quite as mandatory in form as section 645 of the Code. In *O'Connell v. The Queen*, 11 C. & F. 155, a case governed by chapter 37 of 1 and 2 Vic., it was held that the omission of the foreman to put his initials opposite the name of a witness did not afford ground for quashing the indictment. There are several decisions in the United States Courts to the same effect: *Commonwealth v. Edwards*, 70 Mass. 5; *State v. Wilkinson*, 76 Me. 317. In *Reg. v. Townshend*, 1896, 28 N.S.R. 468, a decision upon section 645 of the Code, it was held that the indictment should not be quashed by reason of the omission of the foreman to put his initials against the name of each witness sworn before the Grand Jury. By consenting to commit a breach of the peace persons cannot take away the criminal nature of the act, as their consent can in no way affect the rights of the public: *Regina v. Coney*, 1882, 8 Q.B.D. 534.

WINNIPEG, June 27, 1898.

TAYLOR, C.J.—

The case was argued by counsel for the accused and for the Crown, and the question of what evidence a grand jury can act upon and whether they can find a true bill upon unsworn evidence was argued with ability and learning. It seems to me, however, that I am not called upon to consider such wide questions as these. From the wording of the reserved case it appears the grand jury had sworn evidence be-

fore them. The question submitted for the opinion of the Court is, whether the failure of the foreman of the grand jury to write his initials opposite the names of "the witnesses who had been sworn and examined before the grand jury" was a fatal omission, and whether on that account the indictment should be quashed.

The question then seems to be, is the provision in section 645 imperative or directory only, and that seems answered by *O'Connell v. The Queen*, 11 C. & F. 155. The provisions of the Imperial Act, 1 and 2 Vic. c. 37, are similar to those of section 645.

In *O'Connell v. The Queen* questions as to the proper swearing of witnesses before the grand jury and of the evidence of their having been sworn were raised by a plea which was overruled on several grounds. But, Lord Campbell dealing with the point as to the foreman of the grand jury initialling the names of witnesses examined before the grand jury said, "I have no difficulty in overruling the point that there is no statement on the indictment of the names of the witnesses sworn, the words of the statute on this subject must be taken to be only directory."

In *Queen v. Townsend*, 28 N.S.R. 468, this section of the Code came under the notice of the Court in Nova Scotia, and a majority of the judges held that its provisions are directory only. Townshend, J., said: "The omission of the foreman's initials against the names of the witnesses does not vitiate the indictment as the provision is merely directory." And Meagher, J., said: "The question arising upon this branch of the case is covered by very high authority; but even if that did not exist, I cannot discover any reason or principle upon which it could be said that failure to affix such initials to the name of each witness sworn before the grand jury constituted good ground for quashing an indictment."

Acts similar to section 645 have been dealt with by courts in different American States, and they have not come to a uniform conclusion. In *Scott v. The People*, 63 Ill. 508, and *Andrews v. The People*, 117 Ill. 195, the Court seems to have



held that the failure of the foreman of a grand jury to comply with the statutory requirements would be ground for quashing an indictment. In Massachusetts the Court held the provision to be directory only, and that the omission to comply with it did not furnish any ground for quashing an indictment. *Commonwealth v. Edwards*, 70 Mass. 5. In *The State v. Wilkinson*, 76 Maine, 317, the Court of Maine came to the same conclusion.

As to the second question, the accused was charged with a breach of the peace, and how can an agreement between himself and another that an offence against the Queen's peace should be committed ever be pleaded as a defence?

Had there not been a case reserved on the other point, I am quite sure the learned Judge would not have reserved this one.

Both questions should be answered in the negative, and the conviction affirmed.

BAIN, J.—

I think the second question reserved by the learned Judge should be answered in the negative. The prisoner was indicted for an assault occasioning actual bodily harm; and the jury found him guilty of common assault. I think it must be assumed from the case reserved that the fight between the complainant and the prisoner was a fight in the ordinary sense of the word, a contest entered into in a spirit of hostility and anger. Then, if it were, there was a breach of the peace; and an individual cannot by consent destroy the right of the Crown to protect the public and keep the peace. In *Reg. v. Coney*, 1882, 8 Q.B.D. 534, where it was urged that, as each of the combatants had assented to the fight, neither could be convicted of an assault on the other, the question of consent was very carefully considered by the Judges; and the following statement of the law, in the judgment of Mr. Justice Cave, is borne out by all the other judgments: "The true view is," the learned Judge said, "that a blow struck in anger, or which is likely or which is intended to do corporal hurt, is an assault, but

that a blow struck in sport, and not likely, nor intended to cause bodily harm, is not an assault ; and that an assault being a breach of the peace and unlawful, the consent of the person struck is immaterial."

With regard to the other question reserved, we must assume I think, from the statement of the case and the form of the question itself, that the witnesses, or some of them, whose names were indorsed on the back of the bill of indictment, had been sworn and examined before the grand jury, and that the foreman had merely omitted to carry out the direction of section 645, that he "shall write his initials against the name of each witness sworn by him and examined touching such bill of indictment."

The effect of the provisions of section 641 of the Code has doubtless been to take away from grand juries the power they once had of finding indictments on their own knowledge ; and as it appears here that witnesses had in fact been sworn and examined before the grand jury, there is no room for the argument that the direction in section 645 is not applicable.

The Interpretation Act says that "shall" shall be construed as imperative. It seems, however, that in saying this, the meaning of the Interpretation Act is not that "shall" shall always be construed as imperative in the sense that the necessary result of disobedience is the nullification of the proceedings. In speaking of the same provision in the Ontario Statutes, Burton, J.A., said, "The Interpretation Act leaves the law pretty much as it had been previously held by judicial decision to be," *Trenton v. Dyer*, 21 Ont. App. R. 379, and the decision of the case in the Supreme Court (24 S.C.R. 474) bears out this view. Speaking of the directions of a statute that certain things shall be done, Strong, C.J. said, "*Prima facie* the presumption, as well under the Interpretation Act as without it, is that they are imperative. It is for the appellants to demonstrate that they are directory merely."

In *Howard v. Bodington*, L.R. 2 P.D. 203, Lord Penzance, after pointing out that no universal rule can be laid down

for determining whether mandatory enactments should be considered imperative or directory only, said, "I believe, as far as any rule is concerned, you cannot safely go further than that in each case you must look to the subject matter, consider the importance of the provision that has been disregarded, and the relation of that provision to the general object intended to be secured by the Act; and upon a review of the case in that aspect decide whether the matter is what is called imperative or only directory." Now, looking at the direction in question here from the point of view thus suggested, I would be inclined, I think, even if there were no authorities in point, to take the view that, when a grand jury has found a true bill on the evidence of witnesses sworn and examined before it, and has returned the bill into court, it was not the intention of Parliament that the omission of the foreman to initial the names of the witnesses who had been examined, should have the effect of invalidating the indictment. The names of all the witnesses who could be examined by the grand jury will be on the back of the indictment; and I fail to see that the accused can be really prejudiced merely because the indictment does not show who of the witnesses named had been examined. On the other hand, the public inconvenience that might result if the foreman of a grand jury could invalidate an indictment merely by omitting to set his initials against the witnesses' names is very manifest, and seems to outweigh whatever advantages there may be in having the names initialled.

At all events, this was the view of the enactment taken by the Court of Nova Scotia in *Reg. v. Townsend*, 28 N.S.R. 468, and it is justified, I think, by the opinion of the judges given in reference to a similar provision in the Imperial Act, 1 and 2 Vic. c. 37, that came in question in *O'Connell v. The Queen*, 11 C. and F. 155. By this Act it was directed that the Clerk of the Crown should indorse on the back of each bill of indictment to be laid before grand juries in Ireland, the names of all the witnesses for the Crown; and the foreman or other member of the jury was authorized to administer the oath to any of these witnesses. Then it was

directed that the foreman or other member who had administered the oath "shall upon the back of such bill of indictment state the name or names of such witness or witnesses as shall have been duly sworn, etc., and authenticate the same by his signature or initials." One of the defendants assigned error in fact that the indictment was not found and returned a true bill pursuant to the directions of the statute, inasmuch as neither the foreman nor any other member of the grand jury, by his signature or initials, did authenticate the fact that the witness had been sworn or made affirmation. But the judges were unanimously of opinion that the error complained of was founded on a part of the statute that was directory only and not imperative. In giving the opinion of the judges, Lord Tindal, C.J., said, "It cannot be law that, after the witness has been duly sworn and examined, and the bill returned a true bill on his evidence, it can be deprived of its legal operation and character by reason of the foreman of the grand jury having neglected to comply with such direction in the statute."

The procedure under our Criminal Code differs in two respects only from that prescribed by the above statute. Under the Code, the witness may be sworn either in court or by the foreman or other member of the grand jury, whereas under the statute, they could be sworn only before the grand jury itself. And under the statute, the foreman is not merely, as under the Code, to indicate the witnesses who have been sworn by placing his initials against the names of these witnesses already on the back of the bill, but he is to state the names of the witnesses upon the back of the bill and authenticate the statement by his signature or initials. I gather that in *O'Connell v. The Queen*, the name of the witness who had been sworn and examined had been indorsed on the back of the bill. But the indorsement of a name without the authentication required by the statute amounted to nothing; and I think the two cases are so nearly alike, that the opinion of the judges may be safely followed here, and especially as it has already been followed by the court in another Province.

I think the first question reserved should be answered in the negative.

KILLAM, J., concurred.

Conviction affirmed.

**Note :** *Consent in cases of assault—Effect of.*

No one may consent to any act which is either intended to cause or is likely to cause death or any grievous bodily harm. It is unlawful for a man either to kill or maim himself, and he cannot lawfully consent to be killed or maimed by another person. And so duelling is against the law, and, if two persons deliberately agree to fight a duel and one kill the other, he is guilty of murder. Prize-fighting also is illegal, although no more deadly weapons be used than the naked fists of the combatants ; for here the object of each is to do to the other as much harm as can be done with the hands, so long as he keeps within the rules under which they fight, and to subdue the other until from injury or exhaustion he is unable to fight any more. In the case of *Reg. v. Coney* (30 W.R. 678, 8 Q.B.D. 534), which was argued before the whole of the Queen's Bench Division, all the judges were agreed that a prize-fight is illegal, and that the consent of the parties to fight could not make it legal. Stephen, J., said : "When one person is indicted for inflicting personal injury upon another, the consent of the person who sustains the injury is no defence to the person who inflicts the injury, if the injury is of such a nature or is inflicted under such circumstances that its infliction is injurious to the public as well as to the person injured. But the injuries given and received in prize-fights are injurious to the public, both because it is against the public interest that the lives and the health of the combatants should be endangered by blows and because prize-fights are disorderly exhibitions, mischievous on many obvious grounds. Therefore, the consent of the parties to the blows which they mutually receive does not prevent those blows from being assaults."

If, whilst playing a game, a player deliberately infringes

the rules, and in so doing hurts another, he is guilty of an assault, for the consent of the person injured only extends to acts committed within the rules. East, in his Pleas of the Crown, says: "If two were engaged to play at cudgels, and the one made a blow at the other likely to hurt before he was upon his guard, and without warning, and death ensued, the want of due and friendly warning would make such act amount to manslaughter, but not to murder, because the intent was not malicious." (Sol. Jour.)

And no rules or practice of any game can make that lawful which is unlawful by the law of the land; and the law of the land says you shall not do that which is likely to cause the death of another. *R. v. Bradshaw*, 14 Cox C. C. 83.

A charge of common assault may in certain cases be completely answered by proof of consent on the part of the person bringing the charge. Thus, if a man strike another with a stick, this is *prima facie* an offence, although no real harm be done; if, however, the two had agreed to engage in a match of singleticks, and in the course of the game, and without transgression of its rules and with no intent to inflict harm, the complainant was struck, his consent to run the risk of receiving a blow is a defence to the charge of assault.

*"Shall"—When imperative and when directory only.*

Whenever a statute declares that a thing "shall" be done, the natural and proper meaning is that a peremptory mandate is enjoined.

But where the thing has reference to:—

(1) The time or formality of completing any public act, not being a step in a litigation or accusation, or (2) the time or formality of creating an executed contract whereof the benefit has been, or but for their own act might be, received by individuals or private companies or private corporations; the enactment will generally be regarded as merely directory, unless there be words making the thing done void, if not done in accordance with the prescribed requirements. Stroud's Judicial Dict., 723.

## [HIGH COURT OF JUSTICE, ONTARIO.]

BEFORE MACMAHON, J.

## THE QUEEN v. MURRAY.

*Dies non—Preliminary inquiry held on a statutory holiday—  
County Judge's Criminal Court a court of record—  
Review by writ of error.*

1. A preliminary inquiry held by a magistrate and a commitment for trial made on a statutory holiday are bad in law.
2. If after such commitment the accused elects to be tried at the County Judge's Criminal Court and pleads there to the charge and is convicted, the conviction is not invalidated because of the invalidity of the commitment for trial.
3. Per Court of Appeal: Habeas Corpus proceedings do not lie to inquire into the validity of a conviction made at a County Judge's Criminal Court as the latter is a court of record.
4. Per Court of Appeal: Proceedings of a court of record can be reviewed only upon a writ of error.

ARGUED : August 19, 1897.

DECIDED : August 24, 1897.

Motion in Chambers on behalf of the prisoner, upon the return of writs of habeas corpus and certiorari in aid, for an order for his discharge from custody, under the circumstances appearing in the judgment.

*D. O'Connell* for the prisoner.

*A. M. Dymond* for the Crown.

TORONTO, August 24, 1897.

MACMAHON, J.—

A writ of habeas corpus was obtained, directed to the sheriff of the county of Peterborough, to produce the body of the prisoner together with the cause of his detention. A consent was indorsed by counsel on the writ dispensing with the production of the body of the prisoner.

A writ of certiorari was issued in aid of the habeas corpus.

Upon the return of the writs Mr. O'Connell moved for the discharge of the prisoner on the ground that the preliminary

investigation resulting in the commitment of the prisoner for trial took place on the 1st July—Dominion day—which, by R.S.C. ch. 1, sec. 7 (26), is a “holiday,” and therefore a *dies non juridicus*.

From the return to the certiorari it appears that the prisoner was on the 1st day of July, 1897, brought before Robert S. Davidson, a justice of the peace for the county of Peterborough, acting for and in the absence of and at the request of D. W. Dumble, Esquire, the police magistrate for the town of Peterborough, charged with an attempt to steal certain goods and money from the person of Martha A. Trew, and after hearing the evidence of the witnesses, the magistrate committed the prisoner to the common gaol at Peterborough for trial on the said charge.

The offence charged against the prisoner being one triable at the General Sessions of the Peace, the sheriff, in compliance with the requirements of sec. 766 of the Criminal Code, notified the Judge that the prisoner was confined in gaol on said charge, and, according to the record of the proceedings, the prisoner was brought before the Judge of the County Court on the 2nd July, and was asked if he consented to be tried by the Judge without the intervention of a jury, and the prisoner thereupon consented to be so tried, and upon the evidence adduced was by said Judge convicted of the offence of attempting to commit a theft, and was on the 28th July sentenced to imprisonment in the county gaol for a period of three months.

On the writ of certiorari the learned County Court Judge has indorsed a certificate to the effect that at the trial counsel for the prisoner objected that the preliminary investigation before the magistrate took place on the 1st July, 1897, and that the prisoner could not be validly tried, but he (the Judge) overruled the objection and proceeded with the trial.

A writ returnable on a Sunday or other *dies non* is a nullity; Chitty's Archbold's Practice, 12th ed., p. 160; *Morrison v. Manley*, 1 Dowl. N.S. 773; *Kenworthy v. Peppiat*, 4 B. & Al. 288; *Swann v. Broome*, 3 Bur. 1595. And a judgment signed on a *dies non* is a nullity; *Harrison v. Smith*,



9 B. & C. 243. Littledale, J., in that case said : " There are certain days, as well as Sundays, which are *dies non juridici*. On those days the Court cannot do any judicial Act." And in *Lampe v. Manning*, 38 Wis. 673, where an action was tried before a justice of the peace on a day which by a statute of the State was made a " holiday," the judgment was moved against because the day of the trial was a legal holiday. In delivering the judgment of the Supreme Court of Wisconsin, Lyon, J., said : " The day on which the cause was tried and judgment rendered was a legal holiday, and hence was, as the term *holiday* imports, *dies non juridicus*. Such being the case, the Court had no authority to hear the case and render judgment on that day." See also *Baxter v. The People*, 3 Gilman (Ill.) 368 ; *Chapman v. The State*, 5 Blackford (Ind.) 111.

So that, had the trial and conviction of the prisoner taken place on Dominion day, which by the Act is a " holiday," and therefore a *dies non*, he must have been discharged from custody. But the prisoner was not tried on that day, nor is he now confined in gaol by virtue of any warrant of commitment respecting the judicial act performed on that day. The preliminary investigation on that day was a nullity, and the warrant of commitment was a nullity, and had a motion been made for his discharge while in custody under such warrant he must have been discharged. But such discharge would have been of little avail, as, having only been committed for trial, and not having been tried, he could be re-arrested, and after another and valid preliminary investigation put upon his trial. It is not as if the magistrate had tried and convicted him for an offence under the Summary Convictions Act on a *dies non* ; for in such case, if the prisoner were discharged because of the judicial act being a nullity, he could not be re-arrested, as he had once been tried and convicted of the offence charged. But the illegality of the preliminary investigation, or the fact that the prisoner was committed for trial and confined in gaol on a warrant that was a nullity, cannot affect the trial before the Judge under the Speedy Trials Clauses (Cr. Code.) When the prisoner was brought before

the Judge he elected to be tried by him without the intervention of a jury, and on his being arraigned on the charge for which he was committed for trial, he pleaded "not guilty," so that all the requirements of the Criminal Code were complied with at the time the prisoner was placed on his trial. He was tried on the charge and convicted of the offence by the Judge, who sentenced him to imprisonment for three months, and he is now serving out the sentence ~~so~~ imposed.

The motion to ~~discharge~~ the prisoner must be refused, and the writ of habeas corpus suspended.

An appeal from the above decision was heard by the Court of Appeal for Ontario on the 14th September, 1897. Judgment was delivered on the 17th September, 1897, dismissing the appeal upon the ground that the County Judge's Criminal Court was a court of record, and, after a conviction by such a court having general jurisdiction over the offence charged, the proceedings are reviewable only under a writ of error and cannot be the subject of investigation under a writ of habeas corpus. (BURTON, C.J.O., and OSLER, MACLENNAN, and MOSS, JJ.A.)

**Notes:** "*Dies non*"—Holiday—Commitment for trial.

See *R. v. Cavelier* (Man.) ante p. 134 and note p. 140.

*County Judge's Criminal Court*—A "*court of record*"—Review by reserved case or writ of error.

The Habeas Corpus Act, 29-30 Vict. 1866, (Prov. of Canada) c. 45, now R.S.O. 1897, c. 83, precludes the right to a writ of habeas corpus where the judgment conviction or decree is that of a "*court of record*."

The County Judges Criminal Court in Ontario was constituted by 36 Vict., 1873, (Ont.) c. 8 s.s. 57 and 58. By sec. 57, now R.S.O. 1897, c. 57, s. 1, the judge of every county court, or the junior or deputy judge thereof, authorized to act as chairman of the general sessions of the peace for any county, is constituted "*a court of record* for the trial out of sessions and without a jury, of any persons committed to gaol on a charge of being guilty of any offence for which

such person may be tried at a court of general sessions of the peace, and for which the person so committed consents to be tried out of sessions and without a jury"; and by sec. 58, now R.S.O. 1897, c. 57, s. 2, the court so constituted was styled "The County Judge's Criminal Court" of the county in which the same is held.

The court so constituted has all the powers and duties which secs. 763-781 Cr. Code purport to give, so far as the Legislature of Ontario can confer the same, R.S.O. 1897, c. 57, s. 1.

Being a court of record its judgment cannot be reviewed on a writ of habeas corpus. *R. v. St. Denis* 1875, 18 Ont. Pr. 16.

If the proceedings of a court of record are erroneous, the proper way to object to them is by writ of error, unless special provision is otherwise made. *R. v. Goodman*, 1883, 2 Ont. R., 468.

If a question of law arises "on the trial" and can therefore be made the subject of a "Reserved case" under the Criminal Code, a writ of error founded thereon will be quashed. *Morin v. The Queen*, 1890, 18 Can. S. C. R., 407.

But if the question arises *before* the trial commences and can therefore not be reserved for the opinion of a court of appeal, and the error of law appears on the face of the record the remedy by writ of error is applicable. *Brisbois v. The Queen*, 1888, 15 Can. S. C. R., 421; *Morin v. The Queen*, 1890, 18 Can. S. C. R., 407.

The sufficiency of an indictment upon motion to quash is not a question of law which arises *on* the trial, and cannot therefore be made the subject on a "reserved case." *R. v. Gibson*, 1889, 16 Ont. R. 704; *R. v. Faderman*, 1850, 1 Den. C. C., 565.

The court can dispense with the attendance at an argument on a writ of error of the plaintiff in error who is in custody under the conviction. *Richards v. The Queen*, 1897, 1 Q. B., 574.

## [SUPREME COURT OF NOVA SCOTIA.]

BEFORE McDONALD, C. J., WEATHERBE, RITCHIE, AND  
TOWNSHEND, JJ., GRAHAM, E. J., AND HENRY, J.,  
SITTING AS A COURT OF APPEAL FOR CROWN  
CASES RESERVED.

## THE QUEEN v. CORBY.

*Failure of Prisoner's Wife to Testify—Comment by Prosecuting  
Counsel—New Trial—Canada Evidence Act, s. 4 (2).*

1. Comment by the prosecuting counsel before the jury in respect of the failure of prisoner's wife to testify is error entitling the prisoner to a new trial.
2. The rule is to be applied, notwithstanding a subsequent withdrawal of the comment and notwithstanding the judge's direction to the jury to disregard it.
3. The objection is not waived, because not taken at the time, and it is sufficient if drawn to the attention of the trial judge after the jury have retired to deliberate.

ARGUED : November 23, 1897.

DECIDED : January 11, 1898.

At the October term of the Supreme Court at Liverpool, N.S., His Lordship, Mr. Justice Henry, presiding, the grand jury preferred an indictment against defendant in the words and figures following :—

## IN THE SUPREME COURT.

The Jurors of our Lady, the Queen, present, that on the first day of October, in the year 1897, at Liverpool, in the County of Queens, John Corby unlawfully stole a quantity of pine oil, the property of James C. Inness.

(Sgd.) JASON M. MACK,  
*Barrister, acting for the Queen.*

The defendant was arraigned and pleaded not guilty, and the trial was held on 6th October, 1897, before a jury. Jason M. Mack, Esq., was counsel for the prosecution. The prisoner was defended by James A. McLean, Q.C. Evidence was given on behalf of the prosecution and on behalf of

defendant. The prisoner gave evidence on his own behalf at said trial. The prisoner's wife was not called or examined on said trial on behalf of defendant.

By the Canada Evidence Act, 1893, 56 Vic. (Can.), c. 31, s. 4, it is enacted as follows :—

Sub-Sec. 2, "The failure of the person charged, or of the wife or husband of such person, to testify, shall not be ~~made~~ the subject of comment by the judge or by counsel for the ~~prosecution in addressing~~ the jury."

Mr. Mack, the counsel for the ~~prosecution~~, ~~made~~ the failure of the wife of the accused to testify the subject of comment unfavorable to the prisoner in addressing the jury. No objection was made on behalf of the prisoner until after the jury had retired to consider of their verdict.

Before their return into court with their verdict, Mr. McLean, the prisoner's counsel, raised the question of law hereinafter set out, which was reserved for the opinion of the court of appeal.

The jury returned a verdict of "guilty."

Pending the decision of such question, the defendant was ordered to be released, on his giving bail under the statute, and sentence was postponed.

The point raised on the trial for the defendant, and which is here stated for the opinion of the court of appeal, is the following :—

"That the failure of the wife of the accused to testify was made the subject of comment unfavorable to the prisoner by the counsel for the prosecution, in addressing the jury."

The foregoing matter was stated for the opinion of the court of appeal, viz., "was said point well taken in law, and can the conviction of the defendant be sustained."

*A. Drysdale*, Q.C., for the prisoner. Statutes of Canada, 1893, c. 31, s. 4, sub-sec. 2. It does not affect the case that the objection was not made before the jury retired. 3 Greenleaf on Evidence, pp. 54 to 67. It is error in law which cannot be cured, for the prosecuting counsel to make the comment. We could not waive our objection by silence. *Queen*

v. *Bertrand*, L. R. 1 P. C., 520; 29 Encyc. of Law, p. 680, et seq.; *Wilson v. United States*, 149 U. S., 60; *Long v. State of Indiana*, 26 Am. Repts., 19; *Angelo v. People*, 36 Am. Repts., 132. In this case there was no attempt to cure the error. *Commonwealth v. Harlaw*, 110 Mass., 411; *Commonwealth v. Scott*, 123 Mass., 240; *Commonwealth v. Worcester*, 141 Mass., 58.

*J. W. Longley*, Attorney-General, contra.—This is not an appeal. The American authorities cited are of course not binding here. The act is directory only, and not imperative.

*A. Drysdale*, Q.C., in reply.—The statute is imperative on its face. *Hardcastle on Statutes*, 73. There can be no new trial here. There can only be a new trial in the case of appeal. Before the Code there was no new trial for felony.

*J. W. Longley*, Attorney-General, replied on the point as to new trial.

HALIFAX, January 11, 1898.

GRAHAM, E. J.—

Under the Statutes of Canada, 1893, c. 31, s. 4 (d), which enables defendants, and the husbands and wives of defendants to testify in criminal cases, there is this provision:—

“The failure of the person charged, or of the wife, or of the husband of such person to testify, shall not be made the subject of comment by the judge, or by counsel for the prosecution in addressing the jury.”

In this case it appears that the prosecuting counsel violated this provision (no doubt inadvertently), by referring to the failure of the party to produce his wife as a witness.

Apparently, it was not noticed by the presiding judge, and, therefore, was not prevented, or further reference made to it. The prisoner's counsel, after the jury retired to consider their verdict, first called the attention of the judge to it. Counsel for the defendant called our attention to the American decisions, and he broadly contended (although it was not necessary for the decision of the case), that under our statute, if reference is made by counsel to the failure to testify, it cannot be cured by the interference of the judge, no matter

how prompt, nor by his directions to the jury to disregard the observation ; that the result must always be a new trial. In the United States, however, there is great variety in the statutes, and some variety in the decisions. I cannot find that there is a sharp line drawn between cases in which the statute prohibits comment, and those in which the provision is that the neglect to testify shall not create any presumption against him. I find, moreover, that the statutes in some of the States where this doctrine has been held differ from ours.

Thus in Iowa the statute runs :—And should he do so, (refer to the default to testify) such attorney will be guilty of a misdemeanor, “and the defendant for that cause alone be entitled to a new trial.” 3 Greenleaf on Evidence, 57.

Of course, a violation of that statute could hardly be cured ; there must be a new trial.

In Indiana, *Long v. State*, 26 Am. R., 19, the statute was :—

Fourth. The defendant, to testify in his own behalf, but if the defendant do not testify, his failure to do so shall not be commented upon or referred to in the argument of the cause, nor commented upon, referred to, or in any manner considered by the jury trying the same, etc.

The court checked the attorney in his remarks, and instructed the jury to pay no attention to what was said. But the court of appeal held that the statute required silence on the subject, and ordered a new trial.

The same course was pursued in Illinois in *Angelo v. People*, 36 Am. R., 132, where the language of the code is :

“His neglect to testify shall not create any presumption against him, nor shall the court permit any reference or comment to be made to or upon such neglect.”

But in *Watt v. People*, 126 Ill., 31, (see 29 Am. Ency., 686), it was said :—

“But it does not necessarily follow that every reference to the law on that subject is prohibited. The true test would seem to be, was the reference intended or calculated to direct

the attention of the jury to the defendant's neglect to avail himself of his legal right to testify."

In *Bradshaw v. People*, 153 Ill., 156, the attorney for the prosecution in an abduction case remarked that the enticing and taking away of the prosecuting witness was not denied by the defendant. The court promptly rebuked him, saying in the presence of the jury, that the defendant, by his plea of not guilty, had denied everything. It was held that the language of the attorney was not such a comment on the defendant's silence as would vitiate the verdict.

And in *Wilson v. United States*, 149 U. S., '66, under that same Illinois code, Field, J., said :—

"The refusal of the court to condemn the reference of the district attorney, and to prohibit any subsequent reference, to the failure of the defendant to appear as a witness, tended to his prejudice before the jury, and this effect should be corrected by setting the verdict aside and awarding a new trial."

And he cites from *Austin v. People*, 102 Illinois, 264 :—

"We do not see how this statute can be completely enforced, unless it be adopted as a rule of practice, that such improper and forbidden reference by counsel for the prosecutor shall be regarded as good ground for a new trial, in all cases when the proof of guilt is not so clear and conclusive that the courts can say affirmatively the accused could not have been harmed from that cause."

In Massachusetts, where the statute merely is "the neglect or refusal to testify shall not create any presumption against them," the Supreme Court, in *Commonwealth v. Worcester*, 141 Mass., 61, said :—

"The court was not required, as a matter of law, to take the case from the jury because the district attorney, in closing for the government, commented upon the fact that the defendant did not testify as a witness. If any objectionable comments of this character were made the defendant's remedy was to object to them at the time, and to ask the judge to instruct the jury that they should not be considered by them



to his prejudice. The judge was not required to treat the whole trial as a nullity by taking the case from the jury."

In Ohio, the statute is :—

"Nor shall the neglect, or refusal to testify create any presumption against him, nor shall any reference be made to, nor any comment upon such neglect or refusal."

In *Calkin v. State*, 98 Am. Dec., 125, prosecuting counsel, in closing, was interrupted by the defendant. Counsel turned to him and said to him in the hearing of the jury; "Mr. Calkin, you had an opportunity to testify in this case and did not do so." The court said :—

"We suppose a case might occur in which the misconduct of counsel for the state, in disregarding the prohibition of the statute above quoted, and of the court in permitting such disregard, or in failing promptly to rebuke and to arrest it, by the exercise of all its authority and power necessary for that purpose, would require the court in the exercise of a just discretion, and out of due regard to the rights of the prisoner, to award a new trial. But in this case the prisoner seems to have provoked the single hasty retort of counsel, and the court does not appear to have been in any way wanting in duty."

In Minnesota, the statute provides that the neglect to testify shall not "be alluded to or commented upon by the prosecuting attorney or by the court." But in *State v. Ahern*, 1893, 54 Minn. 195, it was held :—

"When the evidence of the defendant's guilt is so overwhelming that the court is able to say affirmatively that the jury could have not returned a verdict in his favor without a wilful disregard of their duty, unwarranted remarks of counsel which might otherwise be fatal to the verdict may be deemed harmless error."

I refer to those decisions because the learned Attorney-General contended that, according to English law, there is no reason for holding that a reference by counsel to the fact that the party had not testified, must inevitably, in every case, result in a mis-trial, and that American cases to the contrary must be disregarded; that under English decisions

there may be many violations of law, such as the erroneous reception of testimony, which the judge may cure at the close of the case by telling the jury to disregard it, and he may cure his own misdirection in an earlier part of the summing up ; and that, in the United States, new trials are granted in civil cases for the improper comments of counsel when they would not be in England ; and this idea has been taken over in administering this statute.

I think there is much force in these observations.

Of course, just now when juries are not well aware of the existence of the privilege the defendant has of testifying, it is a great advantage to him that silence should be observed. But, by and by, when it becomes as well known in criminal cases as it is now in civil cases, that a defendant may testify, and the jury will always know it, then a mere reference to the failure of the defendant to testify will hardly prejudice the defendant. And there can be no more than a reference to it, if the judge, as he surely would do, promptly interferes, and stops the comment of counsel, and tells the jury to disregard it.

It is "comment" on the failure to testify which the statute intends to prohibit ; showing the various matters (as counsel do in civil cases, when a party does not go on the stand), which could have been cleared up by his testimony, the various inferences against his case, and statements of other witnesses, that he could have contradicted. There is always great force in such comments.

It is not necessary, however, to determine what the proper construction of this statute is on this particular point ; whether the result of a reference by counsel to the failure to testify, must always be a new trial, or whether it is not a matter that may be checked and cured by the judge. I reserve my opinion upon it.

In this case, it is reported that there was unfavorable comment which was not checked or cured.

Under some of the American decisions referred to, the counsel for the defendant should have raised his objection at the time. But under *Regina v. Bertrand*, L. R., 1 P. C.,

520, I am disposed to think he did not waive his right to raise it when he did, and to have the advantage of it now.

In the circumstances of this case, which are peculiar, I think there ought to be a new trial.

RITCHIE, J.—

Sub-sec. 2, of sec. 4, c. 31, of the Acts of the Dominion Parliament for 1893, provides that :—

“The failure of the person charged, or of the wife or husband of such person, to testify, shall not be made the subject of comment by the judge or by counsel for the prosecution in addressing the jury.”

In the case before us, the wife of the accused did not testify, and the counsel for the prosecution, in addressing the jury on behalf of the Crown, made such failure to testify the subject of comment unfavorable to the prisoner.

Such a provision is new to our criminal procedure, and no cases can be found in the reports of the decisions of British courts to guide us. When once the comment is made the mischief which the law was designed to prevent has been done and nothing can afterwards be said by either counsel or judge, that will be calculated entirely to remove the effect of that comment upon the minds of the jury. The accused is entitled to the protection the law has thus afforded him and it can only be done by granting a new trial. A similar law is in force in several of the United States, and there, in cases like this, a new trial is granted.

The counsel for the accused contended, that on a case reserved, the court of appeal could not order a new trial, but I think that power is clearly given by sec. 746 of the Code.

In this case the verdict will be set aside and a new trial granted.

TOWNSHEND, J., concurred.

WEATHERBE, J.—

On the trial of the defendant for larceny the prisoner gave

evidence on his own behalf. The wife of prisoner was not called or examined.

The failure of the wife of the accused to testify was made the subject of comment by counsel for the prosecution unfavorable to the prisoner in his address to the jury.

Objection was taken by the prisoner's counsel after the jury retired (and not before), and before verdict, and the point was reserved whether the conviction is good.

The comments are distinctly forbidden by the statute enabling the husband and wife to give evidence on their own behalf.

The following authorities were cited on behalf of the prisoner, and none cited for the Crown : N. S. Acts 1893, c. 31, sec. 4, sub-sec. 2 ; Greenleaf on Evidence, vol. 3, pp. 54 to 67 ; *Queen v. Bertrand*, L. R. 1 P. C., 520 ; *Wilson v. United States*, 149 U. S., 60 ; 29 Encyc. of Law p. 680, et seq. ; *Long v. State of Indiana*, 26 Am. R., 19 ; *Angelo v. People*, 36 Am. R., 132 ; *Com. v. Harlaw*, 110 Mass., 411 ; *Com. v. Scott*, 123 Mass., 240 ; *Com. v. Worckster*, 141 Mass., 58 ; Hardcastle on Statutes, p. 73.

While the statute remains as it is, I see no effectual remedy for the prisoner against the violation of it unless we hold the trial to be irregular in all such cases. I see no other mode of interpreting the statute.

HENRY, J.—

In this case it appears that the statute was violated, and that nothing was done at the trial to counteract the effect of its violation.

The matter was in the highest degree material. I am clearly of opinion that the conviction should be quashed and a new trial held.

**Notes :** *Irregularity—Consent of Prisoner.*

In *Attorney-General v. Bertrand*, 1867, L. R., 1 P. C., 520, the facts were that a prisoner had been tried in New South Wales for felony, after a previous trial and disagree-

**Notes : (Continued.)**

ment of the jury thereat. On the second trial some of the witnesses were re-sworn, and their evidence given at the first trial was read over to them from the judge's notes at the instance of the presiding judge, who informed each witness that he intended to read over the notes which he, the judge, had taken of the evidence given by the witness at the former trial, and that if the witness wished to add anything to the evidence he had then given, or to alter or correct it in any way, he could do so. The judge also then informed the counsel for the prisoner and the counsel for the crown that if either of them wished to ask the witness any questions he could do so. No specific or definite consent was given by the prisoner or his counsel as to the proposed course being adopted, or as to any specific witness being thus examined, but no objection was then made by the prisoner or his counsel, and they were considered by the court to have assented to the course proposed. The Judicial Committee expressed the opinion that such a mode of laying the evidence before the jury was to be discouraged, although not amounting in law to a mis-trial.

Sir John Coleridge, delivering the judgment of the Committee, said :—

“ The object of a trial in a criminal case is the administration of justice in a course as free from doubt or chance of miscarriage as merely human administration of it can be, not the interests of either party. This remark very much lessens the importance of a prisoner's consent, even when he is advised by counsel, and substantially, not, of course, literally, affirms the wisdom of the common understanding in the profession, that a prisoner can consent to nothing.”

***Comment on Failure to Testify.***

It is the duty of the court to carefully protect the accused from damaging insinuations, cunningly devised, which may not in terms invite a consideration of prisoner's failure to testify but make indirect and covert allusion to the defendant's silence. *Dawson v. State*, 1893, 24 S. W. Rep. 414,

**Notes :** (*Continued.*)

(Texas App.). So where counsel for the prosecution stated a conversation between defendant and a witness, to which the latter had testified, and then exclaimed, "Who has denied it?" such was held to be a comment on defendant's failure to testify, for the defendant was the only person who could deny it. *Dawson v. State*, Ibid. But comment on the failure to contradict testimony, where it does not appear that the accused is the only person who can contradict it, is not prohibited. *State v. Weddington*, 103 N. Car. 372.

Where the prosecuting counsel, in his address to the jury, after referring to evidence of the prisoner's whereabouts at the time of the offence, turned to the prisoner, and said, "Now, where does he say he was, if he was not there?" such was held good ground for reversing the conviction, although the prosecuting counsel was promptly admonished by the presiding judge to refrain from remarks of that nature, and the jury instructed not to consider them. *Brazell v. State*, 1894, 26 S. W. Rep., 723 (Tex. App.).

## [HIGH COURT OF JUSTICE, ONTARIO.]

BEFORE BOYD, C., FERGUSON AND MEREDITH, JJ.,  
SITTING AS A COURT OF APPEAL FOR CROWN  
CASES RESERVED.

## THE QUEEN v. CONNOLLY AND McGREEVY.

*Conspiracy—Evidence to prove—Overt act of one conspirator as  
evidence against all—Venue—Jurisdiction—Acts partly  
extra-territorial—Right of reply on joint indictment—Right of reply as “question of law”  
reserved—Cr. Code 743.*

1. In a charge of conspiracy, it is not necessary to prove that the parties came together and actually agreed in terms to carry out their common design; but the jury may group the detached acts of the parties severally, and view them as indicating a concerted purpose on the part of all as proof of the alleged conspiracy.
2. The bare consulting of those who merely deliberate in regard to the proposed conspiracy, although they may not agree on a plan of action, is of itself an overt act.
3. When the existence of the common design on the part of the defendants has been proved, evidence is then properly receivable as against both of what was said or done by either in furtherance of the common design.
4. The same rule will apply to admit evidence of what was said or done in furtherance of the common design by a conspirator not charged, as evidence against those who are charged, after proof of the existence of the common design on the part of the defendants with such conspirator.
5. The venue in an indictment for conspiracy may be laid either where the agreement was entered into or where any overt act was done in pursuance of the common design.
6. Any such overt act is to be viewed as a renewal or continuation of the original agreement made by all of the conspirators, and, if done in another jurisdiction than that in which the original concerted purpose was formed, jurisdiction will then attach to authorize the trial of the charge in such other jurisdiction.
7. On a joint indictment for one offence, when the evidence for the one would enure to the benefit of the other, the right to a general reply is with the prosecution, though only one defendant called witnesses in defence.
8. *Semble* (per Boyd, C.), the question as to the order of addresses to the jury by counsel at the close of the evidence is not a question of law proper to be reserved for the opinion of a Court of Appeal under Cr. Code, sec. 743.

ARGUED : January, 1894.

DECIDED : February 15, 1894.

Case reserved for the opinion of the Chancery Division of the High Court of Justice, pursuant to the provisions of "The Criminal Code, 1892," by Rose, J.

The two defendants, Nicholas K. Connolly and Thomas McGreevy, were tried for conspiracy, and the indictment was found by the grand jury of the county of Carleton, at the Ottawa Winter Assizes for 1892. It contained twenty counts in conspiracy and preliminary paragraphs setting forth matters of inducement.

The matters of inducement were :

That the defendant Thomas McGreevy was a member of the House of Commons for the Dominion of Canada ; that he was also a member of the Quebec harbour commission ; that the Quebec harbour commissioners were engaged in the construction of the Quebec harbour improvements, expending large sums of money therein, the works being undertaken by contractors from time to time under contract with the commissioners ; that the Parliament of Canada granted large sums of money by way of loan to the commissioners to enable them to prosecute and complete their works ; that as to one of the works for which aid was granted by Parliament, viz., that of "cross wall," the plans were subject to the approval of, and the contract was awarded by the Governor in Council ; that there existed a trading firm known as Larkin, Connolly & Co., having a place of business in Quebec, of which firm Nicholas K. Connolly and Owen E. Murphy were members and partners ; that the said firm were engaged in certain of the works of the said Quebec harbour under contract, and both the said defendants and said Murphy well knew that other works were to be executed and large sums of money were to be expended in and about the said harbour improvements, which were to include the works known as the cross wall.

Of the twenty counts the first set out that on the first day of May, A.D., 1883, at the city of Quebec, in the Province of Quebec, to wit : at Ottawa, in the said county of Carleton, the said Nicholas K. Connolly and the said Thomas McGreevy, unlawfully did conspire, \* \* together, by



divers subtle means and devices, that in consideration of large sums of money to be paid by the said Larkin, Connolly & Co., to the said Thomas McGreevy and one Robert H. McGreevy, that the said Thomas McGreevy should, during the time that he was a member of the harbour commission, and during the time he was a member of the said House of Commons of the said Parliament of Canada, and contrary to his duty in those capacities, secretly furnish information to Larkin, Connolly & Co., to be procured by him in said capacities, \* \* and improperly use his influence as such in breach of trust \* \* in procuring contracts, including that for the cross wall, from said harbour commission, for said Larkin, Connolly & Co., and large gains, profits, and undue benefits.

The second count charged the same conspiracy between the said Connolly, Thomas McGreevy and Robert H. McGreevy.

The third count charged the same conspiracy between the said Connolly, both the McGreevys and one Owen E. Murphy.

The fourth count charged the same conspiracy between the same persons and Michael Connolly and Patrick Larkin.

The fifth count charged the same conspiracy between the defendants, together with divers others unknown.

The next five counts were the same repeated without any local venue being alleged.

The eleventh count charged a conspiracy with a venue, as in count one, between the said Nicholas Connolly and Thomas McGreevy, by false pretences to unlawfully obtain for said Larkin, Connolly & Co., in whose profits the said Thomas McGreevy and Robert H. McGreevy were interested, large sums of money of and from the said harbour commission, with intent to cheat and defraud the said commission.

The next four counts made the same charge against the defendants and the others named as co-conspirators as in counts two, three, four and five, and the next five counts repeated the same charge of conspiracy without any local venue.

The defendants were tried at the Assizes at Ottawa, in the County of Carleton, on November 14th, 15th, 16th, 17th, 18th, 20th, 21st and 22nd, 1893, before ROSE, J., with a jury, and a verdict of "guilty" was rendered.

It appeared that Larkin, Connolly & Co., were a firm of contractors in the Province of Quebec, composed of Patrick Larkin, the defendant Nicholas K. Connolly, Michael Connolly and Owen E. Murphy, and that during the year 1883, one Robert McGreevy (brother of the defendant) was secretly admitted as a partner in the profits without supplying any capital. The Quebec harbour was controlled and managed by a board called the Quebec Harbour Commission, which was engaged in expending large sums of money in harbour improvements. These improvements were made with the sanction and approval of the Minister of Public Works for the Dominion of Canada, which latter furnished by way of loan under the various statutes in that behalf the greater part of the funds to pay for the works.

During all the periods in question the defendant McGreevy was a member of the House of Commons for Canada, as well as a member of the Quebec Harbour Commission. Tenders were advertised for from time to time by the commission for certain works, among which was what was called the "cross wall."

A meeting of the members of the firm of Larkin, Connolly & Co., was held at their office in Quebec, at which Robert McGreevy, as a prospective partner, was present, and who became a partner within a month, and it was decided to tender for the works, and three separate tenders were then prepared and subsequently sent in, one in the name of the firm; one in the name of John Gallagher (an employee of the firm), and one in the name of George Beaucage. Gallagher's tender was prepared and sent in by Michael Connolly, and Beaucage was a person who was controlled by Robert McGreevy in the interests of the firm.

All the tenders sent in (five in number) were opened on May 2nd, 1883, by the commissioners, the defendant McGreevy being present, and were then forwarded to the Department

of Public Works in Ottawa, to be "moneyed out" as to quantities, prices, etc., by an engineer of that department with a view to ascertaining which tender was the lowest.

The defendant McGreevy left Quebec on May 3rd, and arrived at Ottawa on the 4th, from which place he wrote the letters, making certain suggestions in the interest of the firm, mentioned in the judgments of the Chancellor and Ferguson, J., and obtained certain information from the engineer as to the figures of the different tenders and furnished the same to his brother for the use of Larkin, Connolly & Co.

In the three tenders made in the interest of Larkin, Connolly & Co., a mistake had seemingly been made in giving a price for piling at so much per foot of the length of the pile, instead of so much per foot of the pile work when finished.

The chief engineer of the government wrote all three tenderers, pointing this out, and asked if it was a mistake. Michael Connolly wrote a letter in Gallagher's name withdrawing his tender. Robert McGreevy, who had in the meantime procured an assignment of Beaucage's tender, put such a price on the pile work as would raise that tender higher than any of the others sent in, and Larkin, Connolly & Co. refused to amend theirs although they had tendered at 25 cents per lineal foot of pile, amounting to \$500, while the other two independent tenders at \$8 and \$10.50 per foot of pile work amounted to \$20,000 and \$26,000 respectively. This had the effect of making Larkin, Connolly & Co.'s tender, which amounted in all to \$634,340, the lowest by \$8,731.

The chief engineer of the Government who was also consulting engineer for the harbour commission, reported in favor of Larkin, Connolly & Co.'s tender, and pursuant to an order in Council, the chairman of the commission authorized a contract with that firm.

Immediately after the contract for the cross wall was executed, promissory notes of the individual members of the firm of Larkin, Connolly & Co. to the extent of \$25,000 were

signed and given to the defendant McGreevy, and he subsequently obtained in the same manner notes of the firm to the extent of \$22,000 and \$25,000, or \$72,000 in all, for which he gave no value except his said efforts and services in aid of the firm. He also received a large amount of the profits, which came to his brother as a partner in the firm. The evidence also showed that, although Larkin, Connolly & Co.'s tender was apparently the lowest, yet they received \$70,000 more for the work than it would have cost, if the tender of another firm (Peters & Moore), one of the independent tenderers had been accepted.

The defendant Connolly endorsed one or more of the notes given to the defendant McGreevy, and signed the yearly audit of the firm's books, in which they appeared under expense or suspense account, and for which, admittedly, no commercial value was secured by the firm.

It also appeared that a present was made to the chief government engineer, and payments were made to the inspectors of the work from time to time.

Other facts sustaining the charges set forth in the several counts and in the particulars furnished by the Crown appear in the judgments herein.

Objections were taken at the trial to the admission of the evidence set out in the first nine paragraphs following, which were overruled, and the evidence admitted, and the case reserved the questions whether the evidence was proper to be submitted to the jury in support of the indictment. The case also reserved the objections taken to the Judge's charge to the jury set out in paragraphs 10 and 11, and to the right of reply being allowed to the Crown under the circumstances mentioned in paragraph 12.

1. Objection was taken that there was no evidence to be submitted to the jury in support of the indictment, and that no overt act in Ontario, in pursuance of the conspiracy, had been shown : the objection was overruled, and the defendant Connolly was then called and examined as a witness on his own behalf.

2. The evidence of R. H. McGreevy as to transactions,

conversations, and written communications between himself and other persons including Thomas McGreevy, Owen E. Murphy, Michael Connolly and Patrick Larkin, mentioned in the indictment, and as to the acts of himself and the said Murphy and Michael Connolly, as well as certain written communications between him and the said other persons, were received as evidence against both defendants.

3. Evidence of the tenders for, and how a contract for dredging the Quebec Harbour Works was obtained in 1882 by Larkin, Connolly & Co., from the harbour commissioners, was received and submitted to the jury as evidence against both defendants.

4. Two letters from John Gallagher, one to the Public Works Department, and the other to H. F. Perley, the government engineer, were received in evidence and read, on the undertaking of counsel to subsequently prove them.

5. A report from the government engineer to the Minister of Public Works, recommending Larkin, Connolly & Co.'s tender as the lowest, was also received in evidence.

6. Entries in the books of Larkin, Connolly & Co. (not made personally by the defendant Connolly), and statements in writing made by the witness W. H. Cross (an accountant) from the accounts in said books, were also received.

7. The depositions of the defendant Connolly taken for discovery in an action in the Exchequer Court, were received in evidence against him, and he was called as a witness on his own behalf, he was cross-examined and said he did not desire to make any changes in them.

8. The evidence of the witness W. T. Jennings (an engineer), and his calculations respecting the tenders, and the work executed, from figures furnished to him, was received.

9. The evidence of the witness Robert H. McGreevy as to an agreement between the members of the firm of Larkin, Connolly & Co. to give a present to the government engineer, and to make payments to inspectors of the works, was received.

10. The Judge's charge was objected to on the ground

that the jury should have been told the communications between R. H. McGreevy and others were not evidence against the defendant Connolly until a conspiracy was proved.

11. That the Judge should not have told the jury it was "unlawful" for one person to put in several tenders.

12. That as the defendant McGreevy did not call any witnesses, his counsel should have had the right to address the jury last.

The case reserved was argued on January 8th, 9th, 10th, and 20th, before BOYD, C., and FERGUSON and MEREDITH, JJ.

*Aylesworth*, Q.C., for the defendant McGreevy. The whole and only evidence against the defendants, except the documentary evidence, is that of the defendant McGreevy's brother, who was largely indebted to him, and a co-conspirator, although not prosecuted. He did not owe his position as a partner in the firm to his brother's influence, as he had been previously a partner with Larkin, Connolly & Co. in other contracts; and so far from there being any scheme on the part of the defendant, Thomas McGreevy, to have his brother admitted into partnership in the harbour improvements contract, it is shown that the defendant was not aware that he was, or was to be a partner until weeks after the information as to tenders was obtained. Beaucage's interest was assigned to Robert McGreevy for value, viz., \$5,000, weeks before the contract was awarded. Any possible conspiracy affecting Thomas McGreevy, could only be through the medium of Robert McGreevy, and he testifies there was no arrangement between him and his brother. Even the memorandum of information said to have been given to Robert by Thomas was not signed or dated or shown to have been in existence until all details of the tenders had been published. The error in the sheet piling price, was a genuine mistake; the great difference in the prices show this. Gallagher's tender was withdrawn with the approval of the proper authority, as was usual. The letters from Thomas to Robert should not have been received in evidence, and they prejudiced Thomas on his trial. There was no evidence of any conspiracy in Carleton

County or in Ontario ; no overt acts were proved there. The evidence of any contracts previous to May 1st, 1883, should not have been received as that is the date laid and fixed in the indictment in this case. There was no evidence that the defendant Connolly was ever in Ontario. The entries from the firm's books should not have been received in evidence ; the books were not evidence against the defendant McGreevy at all, as he was not concerned in them, nor against the defendant Connolly who had never made any entries in them. The examination of the defendant Connolly in the civil suit in the Exchequer Court should not have been received ; there was no cross-examination or explanation. Connolly's evidence in this case "that it was true," was not given until after the case against McGreevy had been closed, so it could not be received against him, and not being evidence against the one, could not be against the other on this indictment. The trial Judge erred in allowing the Crown to address the jury last. *Reg. v. Le Blanc*, 1893, 13 C.L.T. 441 ; 29 Can. Law Jour. 729.

*S. H. Blake*, Q.C., and *Lash*, Q.C., for the defendant Connolly. The jury should have been told not to regard any evidence of any acts of the alleged individual conspirators, until they were satisfied that an agreement between them had been proved. There should have been an elimination of all that took place in the Province of Quebec in respect to the harbour commission ; and the trial judge erred in giving the acts and conduct of each of the two defendants together to the jury before any agreement was proved. The act of one cannot bind the other until an agreement is proved. The evidence that Robert paid Thomas large sums, proves nothing but that he was paying his own debts, as he was largely indebted to Thomas at the time. The books of the firm show that the sums paid were all retained in a suspense account. That controverts any idea of a conspiracy. Connolly's examination in the Exchequer Court should not have been received, as there was no opportunity for cross-examination. Gallagher's letters were not proved, and should not have been received. The books of the firm were not evidence,

much less the extracts and statements made from them by the witness, Cross, the accountant. No mere calculations or estimates, based on figures supplied, such as those made by the witness, Jennings, even if he were an expert, should have been received, they were too uncertain. The jury should have been told first to endeavor to ascertain if a conspiracy or agreement had been proved, and if not, that the acts of parties, the letters, etc., could not be considered. We refer to *Hardy's Trial Case*, 24 How. St. Tr. 199, at p. 451; *John Horn Took's Case*, 25 St. Tr. 1, 302, 311; *The Queen's Case*, 2 B. & B. 302, 311; *Regina v. Murphy*, 8 C. & P. 297; *McKenna's Case* (1842), Ir. Cir. Rep. (Six Circuit Cases) 461; *Regina v. Duffield*, 5 Cox C.C. 404; *Regina v. Esdaile*, 1 F. & F. at p. 231; *Williamson v. Commonwealth*, 4 Grattan (Va.) 547; *Clawson v. The State of Ohio*, 14 Ohio S.R. 234; *The People v. William G. Saunders*, 25 Mich. 119; *Shields v. McKee*, 11 Bradwell (Ill.) 188; *Logan v. United States*, 14 U.S.R. 263 at p. 308-9; *Luttrell v. State*, 21 S.W.R. 248; *Jones v. North*, L.R. 19 Eq. 426; *The Mogul Steamship Co. v. McGregor*, 23 Q.B.D. 598, [1892] A.C. 25; *In Re Carew Estate*, 26 Beav. 187; *Heffer v. Martyn*, 36 L. J. N. S. Chy. 372; *Metcalf v. Bouck*, 25 L. T. N. S. 539; Roscoe's Criminal Evidence, 11th ed., 180; Wright on Criminal Conspiracies, Bl. ed. 219, 220; *State v. Hadley*, 54 N. H. 224; *The State v. Walker*, 32 Me. 195; *Regina v. Owen*, 9 C. & P. 238; *Regina v. Colmer*, 9 Cox C. C. 506; *Rex v. Davis*, 6 C. & P. 177; *Wheater's Case*, 1 Lewin's Crown Cases, 157; *The Queen v. Coote*, 9 Moo. P. C. 463.

*Osler, Q.C.*, and *Hogg, Q.C.*, for the Crown. The evidence shows Larkin, Connolly & Co. made a profit of over \$954,000 or 43½ per cent. on the amount they expended, while a fair and proper profit would have been from 15 to 25 per cent., and out of that profit \$350,000 was paid away and disposed of without receiving any return of commercial value. That represents the shares of the two McGreevys, \$117,000 of which went direct to the defendant, the harbour commissioner and member of Parliament. The defendants are in contempt for the non-production of the firm's books which their counsel



undertook to produce, and the evidence of the accountant, Cross, as to the contents of the books may be treated as good secondary evidence of the contents of the audits, signed by the defendant Connolly. Even if this was a proper case for a new trial, no new trial should be granted except upon the condition that the contempt be purged by the production of the books. The evidence shews a corrupt agreement between the defendant McGreevy and the firm, and a conspiracy to defraud the Quebec harbour commission, which the jury has believed and on which they have found their verdict, which should not be disturbed. The acts of the parties and the contracts are all to be added together, and the reasonable inference is, that there was an agreement, and that is the way the conspiracy is proved. The notes given to Thomas McGreevy were signed after the contract was awarded, but they were ante-dated, and the amount although charged in a suspense account, was paid or borne by the partners of the firm out of the profits. No value was received for them, except his influence and questionable services. The yearly audit of the books showing how these notes were charged, was signed by the defendant Connolly. The letters written by Thomas McGreevy at Ottawa, were overt acts in this Province, in furtherance of the common design. The ostensible mistake in the three tenders being the same, and the disposal of two of them in the interest of the firm, shew the scheme. The Crown can give evidence of anything in the indictment or particulars, and the evidence respecting the contracts in 1882, was properly received, as particulars of it were given before the trial. The evidence of Jennings was that of an expert, founded on figures supplied, was properly received, and shewed that Larkin, Connolly & Co.'s tender was not the lowest, although it so appeared. It was the obtaining of the secret information by Thomas McGreevy, that enabled the firm to manipulate the tenders. The evidence of Connolly in the Exchequer Court was properly received: *Regina v. Goldshede*, 1 Car. & Kir. 657; *Rex v. Merceron*, 2 Stark. R. 366; *Regina v. Chidley*, 8 Cox C. C. 365; *Regina v. Scott*, 7 Cox C. C. 164; *The Queen v. Widdop*,

L. R. 2 C. C. R. at p. 8; *Ex. p. Schofield, In re Firth*, 6 Ch. D. 230; *Rex. v. William Haworth*, 4 C. & P. 254; Roscoe's Criminal Evidence, 11th ed., 139; *Ex. p. Reynolds, In re Reynolds*, 20 Ch. D. 294; *The Queen v. Coote*, L. R. 4, P. C. 599; *Smith v. Beadnell*, 1 Camp. at p. 33; Taylor on Evidence, Bl. ed., secs. 888, 889, 890. The acts and declarations of any one conspirator are evidence against them all: *Regina v. Shellard*, 9 C. & P. 277; *The Queen v. Blake*, 6 Q. B. 126. Where they are in the nature of an act in furtherance of the common design, the jury may infer the conspiracy: Archbold's Criminal Pleading and Evidence, 21st ed., 1105; *Ford v. Elliot*, 4 Ex. 78.

We refer also to *Regina v. Duffield*, 5 Cox C. C. 404; *Rex v. Roberts*, 1 Camp. 399; *Blake v. The Albion Life Association Society*, 4 C. P. D. at p. 97; *Rex v. Cope*, 1 Str. 144; Wright on Criminal Conspiracies, 212, 216; *The King v. Hunt*, 3 B. & Ald. 566; *The Waterloo Mutual Ins. Co. v. Robinson*, 4 Ont. App. at p. 301; *The King v. Brisac*, 4 East 164; *The King v. Bowes*, cited in 4 East at p. 171; *The Queen's Case*, 2 Brod. & Bing. at p. 310; *Regina v. Gallagher*, 13 Cox C. C. 61; *Regina v. Murphy*, 8 C. & P. 297; *The King v. Whitehead*, 1 Dow. & Ry. N. P. 61.

*Blake, Q. C.*, in reply. The government accounts only shew a profit of 30 per cent. which is moderate. The firm's books were taken away by process of law. The indictment cannot be enlarged by particulars. The charging of the notes against the firm was disputed when discovered; that negatives any previous agreement to pay them. There was nothing wrong in Thomas McGreevy hastening the engineers in Ottawa, and if possible indicating the terms. If any extra profits were made it was because there were expensive alterations made in the contract after the work commenced. I refer to Hilliard on New Trials, 2nd. ed., 411, 413; *Campbell v. Prince*, 5 Ont. App. at p. 335; *Pirie v. Wyld*, 11 Ont. R. 422 at p. 430; *Confederation Life v. O'Donnell*, 13 Can. S. C. R. 218, at pp. 224, 226; *Bank of Hamilton v. Isaacs*, 16 O. R. at p. 454; *The Queen v. Gibson*, 18 Q. B. D. 537, at p.

542; Rapalje on Criminal Procedure, sec. 349, pp. 479, 480.

TORONTO, February 15, 1894.

BOYD, C.—

A study of the evidence satisfies me that this is a case which could not properly be withdrawn from the jury. There is abundant circumstantial evidence to warrant the verdict of guilty, and no sufficient reason exists to warrant the interference of this Court of Appeal, either upon the case reserved or upon the application for a new trial.

As to the evidence received, and the manner in which it was received, it is enough to say that the discretion of the trial Judge was rightly exercised. There is no unvarying rule that the agreement to conspire must first be established before particular acts of the individuals implicated are admissible.

The charge of Coleridge, J., in *Regina v. Murphy*, 8 C. & P., at p. 310, conveniently summarizes the usual method of proving a charge of conspiracy: "Although the common design is the root of the charge, it is not necessary to prove that the parties came together and actually agreed in terms to have this common design, and to pursue it by common means, and so carry it into execution. This is not necessary, because in many cases of the most clearly established conspiracies there are no means of proving any such thing, and neither law nor common sense requires that it should be proved. If you find that these two persons pursued by their acts the same object, often by the same means, one performing one part of an act, and the other another part of the same act so as to complete it with a view to the attainment of the object which they were pursuing, you will be at liberty to draw the conclusion that they have been engaged in a conspiracy to effect that object. The question you have to ask yourselves is, 'Had they this common design, and did they pursue it by these common means—the design being unlawful?'"

That course which was also approved of in our own Court of Queen's Bench in *Regina v. Fellowes*, 19 U. C. R., 48, was the one adopted in this case under the direction of the Judge. It was competent for the jury to group the detached facts and view them as indicating a well-understood or concerted purpose on the part of all the actors and privies. Their conclusion I am not disposed to quarrel with, for I think the whole body of facts is inconsistent with any other conclusion than that of concerted action between the defendants. A consideration of the matters in evidence, as to the first transaction respecting the cross-wall contract shews results that support the indictment and supplies evidence of overt acts in Ontario, sufficient to find jurisdiction.

In the preparation of tenders there was a meeting of the members of the firm of Larkin, Connolly & Co., at Quebec. Robert McGreevy was there and assisted—it being then understood that he was to be a partner, though the precise terms were not fixed till the writing of the 6th of June, 1883—Tenders (three) were then prepared in the names of Gallagher (an employee of the firm), of Beaucage who was controlled by Robert McGreevy in the interests of the firm, and of Larkin, Connolly & Co. In all of these appeared (what is said to be) a common mistake in the rate charged per foot for sheet-piling.

On the 2nd May these and other tenders for the cross-wall were opened at Quebec by the harbour commissioners, the defendant Thomas McGreevy, one of the commissioners, being then present.

These tenders were not disposed of by the commissioners, but were to be passed upon at Ottawa by the Public Works' Department. In this way the tenders reached the hands of Mr. Boyd, engineer in that Department at Ottawa, in order to be moneyed out or extended, upon estimates of quantities fixed by him.

Thomas McGreevy (defendant), who was also a member of Parliament, appears to have left Quebec on the night of the 3rd May, and arrived at Ottawa on the 4th. To that

effect he writes his brother Robert on the 5th May, 1883, in a letter containing this passage: "The tenders for cross-wall only arrived here yesterday and are locked up until Monday, when he will commence his calculation. I will write you on Tuesday and let you know the result. Larkin was here yesterday. I told him that it would be useless to get Peters (another tenderer) out of the way, as it would be tantamount to giving the contract to the highest tender, that you would have to stick to Beaucage's tender, as it was fair."

On 7th May, Monday, the defendant again writes from the House of Commons to his brother Robert: "I hope to let you know to-morrow about the result of the cross wall tenders. Have your arrangements right with Beaucage before result is known. I will give you timely notice." Robert had anticipated the receipt of this letter by procuring a transfer of interest from Beaucage on the 4th May for the benefit of Larkin, Connolly & Co.

On Tuesday, 8th May, the member of Parliament again writes his brother that he had seen Boyd that morning, and the letter continues: "I will meet him this afternoon about it and know the result."

Thomas McGreevy thereafter obtained from Mr. Boyd a view of figures shewing the comparative extension of the sheet-piling totals, as tendered for by Peters, Samson and Larkin, Connolly & Co., and this was sent or given to his brother Robert. I think it is evident from Robert McGreevy's evidence that he had access also to information as to the other tenderers' prices and the estimates of quantities on which the government engineer figured, and *that* pending the final acceptance of the successful tender. But apart from this, the memorandum as to sheet-piling afforded a clue, by means of which Larkin, Connolly & Co. were able to obtain the footing of lowest tenderers.

On May 16th, Gallagher sent in a letter of withdrawal, said to be prepared after conference with the defendant Nicholas Connolly. On the next day, 17th May, was written the letter of the chief engineer, Perley, to Beaucage and

Gallagher, calling attention to the evident mistake in their prices for sheet-piling, and answers from them (inspired or written by the firm) were sent on 19th May as to Gallagher and on the 21st as to Beaucage.

On 17th May, Thomas McGreevy, from the House of Commons at Ottawa, writes his brother : " As I told you yesterday to try and get a good plan and as quick as possible, in answer to the letter that Gallagher & Beaucage will receive about their tenders to bring them over L. & C. so as their tender will be the lowest. The contract will be awarded from Ottawa direct."

The plan suggested by Thomas McGreevy was carried out by such amended prices being put upon the sheet-piling as would when extended for Beaucage and Gallagher put their tenders higher than Larkin, Connolly & Co.'s, whereas Larkin, Connolly & Co. declined to correct the error in their sheet-piling prices, and thereby kept themselves lower than Peters.

The memorandum in Thomas McGreevy's writing, taken from Boyd's calculations, shewed in moneyed out tenders :

" Sheet-piling totals.

" Peters, \$20,000, or \$8 per running foot.

" Samson, \$26,000, or \$10.50 per running foot.

" Larkin, Connolly & Co., \$500, or 25 cents per running foot."

As between Larkin, Connolly & Co.'s total tender and that of Peters, as extended, the difference was :

Peters. .... \$643,071

Larkin, Connolly & Co. .... 634,340

The difference was ..... \$ 8,731  
in favor of Larkin, Connolly & Co. Had a reasonable figure been placed on the sheet-piling in response to Perley's letter by Larkin, Connolly & Co., that would have sent up their tender some thousands of dollars above the Peters' tender.

Mr. Perley's official communication of the result on 23rd May, 1883, was in favor of Larkin, Connolly & Co.'s tender, and on the 4th June, pursuant to order in Council, the chair-

man of the harbour commission authorized the contract to be signed with that firm.

On the same day Kinnipple & Morris, engineers of the commission, were dismissed, and the vacancy was filled soon after by the appointment of Mr. Boyd, who had assisted the defendant Thomas McGreevy to the private information already detailed.

When the contract was secured to the firm of Larkin, Connolly & Co., \$25,000 worth of notes of the firm, representing no consideration other than the services hereinbefore set forth (ante-dated to the 1st May, 1883), were handed to Robert McGreevy to be given to his brother, and of this sum \$17,000 appears to have gone to satisfy a judgment of *McCammon v. Thomas McGreevy*. One or more of these notes was signed by the defendant Nicholas Connolly; his share was charged against him in the books of the firm, and was (as he himself admits) passed in the yearly audit of the books of the firm, sooner than break up the concern.

As to the outcome of the transaction (omitting details): Though Larkin, Connolly & Co. were apparently the lowest tenderers on the cross wall contract, yet the calculations of Mr. Jennings shew that taking the quantities as executed, if the contract had been awarded on the Peters & Moore tender, their total price, according to the scale of values given, would have been some \$70,000 less than what was paid to Larkin, Connolly & Co. on the ostensible lowest tender.

I may quote a pertinent passage at this point from the judgment of Whiteside, C.J., in *Mulcahy v. The Queen*, Irish R., 1 C.L. at p. 36, which was approved of by the House of Lords, S.C., L.R., 3 H.L. at p. 328, as to overt acts: "The bare consulting of those who merely deliberate, though they may not agree on a plan of action, is of itself an overt act, because it is a step towards the prosecution of the design. The adoption of a plan is a further step, and all who assent to it are in the same position as if they had met and planned it." So the letters I have extracted are acts admissible against all privy to the conspiracy, as said by

Grose, J., in *Hardy's Trial* by Gurney, "in many circumstances of this sort, it has been determined that *Scribere est agere*": McNally's Rules of Evidence, p. 623. See also the charge of Bayley, B., in *Watson's Case*, 32 State Trials, p. 7.

As to the defendant Connolly, the general evidence and his own admissions shew that he was the managing and resident partner of the firm, had been a contractor in a large way for over twenty years, and took part in signing cheques and in the financial matters of the firm, and was, by his own admissions, privy to this large payment after it was made. But it was eminently a matter for the jury to say whether he was not throughout a participator in the proceedings of this one transaction which worked so harmoniously to a result favourable to the partnership in which he was chief member: *Rex v. Cope*, 1 Str. 144.

I do not propose to dwell upon the series of transactions which follow this and reflect a like result. Taking this as a sample, it justifies the verdict, and it shews overt acts in Ottawa in furtherance of the common design.

I take it that the propositions laid down in Starkie's Criminal Pleadings, pp. 30, 31, and repeated in later authors, are too well understood to be canvassed by the defendants. They are thus expressed: "An indictment for a conspiracy may be tried in any county in which an overt act has been committed in pursuance of the original illegal combination and design \* \*."

So several defendants were holden to have been properly convicted upon an indictment for a conspiracy, though no joint conspiracy had been proved in the county where they were tried, but only overt acts done in consequence of a general conspiracy, evidenced by various acts in other counties." (Edition of 1824.)

This suffices to answer the first matter reserved.

As to the 2nd and 10th, they may be taken together. The transactions, conversations and written communications between Robert McGreevy (the secret partner in the firm) and Thomas, his brother, and the other members of the firm,



were properly receivable in the circumstances of this case. If at first not available against both defendants, they became so, if and when the proof had so far advanced and cumulated as to indicate the existence of a common design on the part of the two defendants, jointly or with others. I am satisfied that such a scheme was well proved on the whole, and that, being so, what was said or done by either defendant or other conspirator in pursuance of the one end is evidence against both or all.

The third point is as to the reception of evidence concerning the dredging contract of 1882. That seems to me to be not irrelevant and admissible as introductory to the later transaction, inviting as it did the secret partnership of Robert McGreevy with the Larkin firm and the manipulation of unreal tenders. Besides, it is specified in the particulars furnished to the defendants before the trial; and these as matters of procedure are subject to the provisions of "The Criminal Code, 1892" (see 56 Vict., ch. 32, sched. sec. 981).

Section 617 says that the particular is to be entered on the record, and the trial shall proceed as if the indictment had been amended in conformity with such particular. The evidence was in this view relevant to the pleadings, and thus not subject to the objection urged.

There was some argument as to the time mentioned in the indictment as the date of the conspiracy, "to wit, 1st May, 1883," precluding evidence of an earlier date. The same objection was overruled by Holt, C.J., in *Rex v. Charnock*, 12 Howard's State Trials, at p. 1397, who said: "The day is not material, but only a circumstance, but in form some day before the indictment preferred must be laid \* \*. Nor are the witnesses \* \* tied up to the particular time or place mentioned in the indictment." It matters not how far back the conspiracy reaches or did begin, if it was afterwards pursued, proof may be given of it. (p. 1399.)

Fourth. The letters purporting to be signed by John Gallagher were properly in evidence, as they were written in

his name by Michael Connolly, brother and partner of the defendant, and in connection with the tenders in question.

Fifth. Perley's report was also properly in evidence on the ground, stated at the trial, that the object of all was to procure a report in their favour.

Sixth. The entries in the books of the firm were of use in fixing a knowledge on the defendant Connolly of the suspicious disbursements of his firm. The results of the payments were in the audits, signed by Connolly, and these books and papers came to the custody of Connolly, and by the undertaking of the counsel of the defendants to produce them were admitted to be in the joint custody of the defendants. The statements of Cross, prepared therefrom, were good secondary evidence in the absence of the originals, withheld by the defendants.

Strictly speaking, the entries in the books of the firm may not have been evidence against the defendant Thomas McGreevy, unless the view be taken that he is connected with the firm through his brother, the secret partner.

But apart from this and from what appears in the books, it is well proved that \$117,000 of the money of the firm went direct to Thomas McGreevy or for his benefit.

As against Connolly, who said he managed the finances and who signed the yearly audits, the evidence was well received; if a wider use of it was made against McGreevy, it does not seem to me a material circumstance which did affect or should affect the result. There was no mistrial, in consequence, which calls for the interposition of an appellate Court. See Section 746 of the Criminal Code.

Seventh. The depositions of Connolly in the Court of Exchequer could be used against him on this trial. It was open for him to have claimed protection in the civil proceedings, and then what he said would have been privileged; but, failing this, what he then said is evidence generally against him. See *Regina v. Garbett*, Den. C.C. 236; *Regina v. Scott*, 1 Dears. & B.C.C. 47; *Regina v. Fee*, 13 O.R. at p. 596; and *The Queen v. Coote*, 9 Moo. P.C. N.S. 463.

Eighth. The evidence of Jennings was that of an expert and was admissible, as calculating results on *data* supplied by the officers (*e.g.*, Boyd) of the Government, who moneyed out the tenders. Some of his calculations were hypothetical, but others, which he gives, rest upon an absolute basis, proper for an engineer to work upon.

Ninth. The evidence of a present to Perley, who was chief engineer of the Government at Ottawa, and afterwards consulting engineer for the harbour commissioners, was a matter proper to be considered by the jury. The present was made with the privity of the defendant Nicholas Connolly, and cast light upon the nature of the relations between the firm and this influential officer. Proverbially, a "gift perverteth the judgment," and this manner of dealing by the firm of Larkin, Connolly & Co., appears to have been part of a system that extended to other public officers connected with the works under contract.

Eleventh. The judge commented adversely on the practice of putting in various apparently competing tenders, and yet all under the control of one person—speaking of it as "unlawful." It is apparent that these tenders could be used to the disadvantage and prejudice of public interests, and that the Government disapproved of the practice.

This is evident from letters put in by the defendants themselves. Sir H. Langevin, on 31st July, 1882, writes to the Secretary-Treasurer of the Quebec Harbour Commission: "I desire to know whether the commissioners have reason to believe that the tenders received, which are lower than the one they prefer, have been made in good faith, and that there has not been collusion with respect to the withdrawal of these tenders." Whereunto replies the officer on the 8th August: "I am instructed respectfully to declare that the commissioners consider that it is not necessary that they should defend themselves against a suspicion of knowledge on their part of collusion between the tenderers for the harbour works."

The Judge commented on the epithet, explaining, if deceit were practised upon the Department in order to obtain an

undue advantage, then such a course was not permitted, and, therefore, *unlawful*. This exposition appears unobjectionable; "unlawful" is of elastic meaning; the use of these fictitious tenders was a "deceit" in itself, and if employed to further the ends of those in combination so as to evade the results of fair competition for the contracts, then it was "unlawful" in the sense of being a thing of public mischief. See now the Code incriminating this practice, sec. 133.

Twelfth. As to the order for addresses at the close of the evidence; if that is a matter proper for reservation (which I doubt), it cannot be said that there was any violation of proper procedure. If the provision of the Code apply, then, according to section 661, as evidence for the defence was given, the right of reply was with the prosecution—a *fortiori* if the counsel was acting on behalf of the Attorney-General. But if the Code does not apply, then the old rule was that on a joint indictment for one offence when the evidence for the one would enure to the benefit of the other, the right to a general reply was with the prosecution, though evidence was given by only one defendant: *Regina v. Hayes*, 2 M. & R. 155; *Regina v. Jordan*, 9 C. & P. 118.

It is not needful to say more than that all the points reserved should be ruled in favour of the Crown, and that the motion for a new trial should be refused.

FERGUSON, J.—

The defendants were indicted for an alleged conspiracy. The trial took place in the city of Ottawa, in the county of Carleton. This is a case reserved by the learned Judge, pursuant to provisions contained in the Code of 1892.

The first paragraph of the case seems to be the most important one, and is in these words: "At the conclusion of the case for the Crown, objection was taken on behalf of the defendants, that there was no evidence to be submitted to the jury in support of the indictment, and that no overt act in Ontario in pursuance of the conspiracy had been shewn. I overruled the objection, and the defendant Connolly was then called and examined as a witness on his own behalf. I reserve, for the opinion of the Chancery Division of the High Court of

Justice, pursuant to the provisions of the Criminal Code, 1892, the question whether there was evidence proper to be submitted to the jury in support of the indictment."

The Crown did not profess to be able to prove the conspiracy alleged by any direct evidence as to the making in fact of an agreement constituting a conspiracy. What was relied on was that this should be presumed or inferred by the jury from facts to be given in evidence against the defendants.

At the bar before us, there was some discussion on the subject as to whether or not acts of an alleged co-conspirator could or should be given in evidence against others of the conspirators before the existence of the conspiracy had been established by other independent evidence.

It is now, as I think, entirely beyond question that a conspiracy can be established without any proof of the making of the agreement in fact, between or amongst the alleged co-conspirators.

In the case *Regina v. Fellowes*, 19 U.C.R. 48, at pp. 57 and 58, the Chief Justice in delivering the judgment of the Court, said: "It was clearly unnecessary to prove that these four defendants, or any two of them, actually met together and concerted such a proceeding as appears to have been carried out. That they did combine and conspire to effect by fraud the return of Mr. Fellowes may be inferred from all the circumstances; and if the jury were satisfied from their conduct, either together or severally, that they were acting in concert, then they were right in looking upon the conspiracy as proved."

Upon this proposition alone, it seems scarcely necessary to refer to authorities. Yet, as there are questions immediately connected with it which were subjects of discussion more or less, I will, at the risk of being considered tedious, refer shortly to a few of the cases and statements found in the books.

A conspiracy is generally a matter of inference deduced from certain criminal acts of the parties accused, done in pursuance of an apparent criminal purpose in common between them: Archbold's Criminal Pleading and Evidence,

21st ed., 1105, citing *Rex v. Brisac*, 4 East 171; and *Mulcahy v. Regina*, L.R. 3 H.L. 306, 317; and it is further said that the prosecutor may go into general evidence of the matter of the conspiracy, before he gives evidence to connect the defendant with it: *Rex v. Hammond*, 2 Esp. 718.

The acts and declarations of any of the co-conspirators, in furtherance of the common design, may be given in evidence against all: Archbold 1105, *Regina v. Shellard*, 9 C. & P. 277, and *The Queen v. Blake*, 6 Q.B. 126. And if one overt act be proved in the county where the venue is laid, other overt acts either of the same or others of the conspirators may be given in evidence, although in other counties: *King v. Bowes*, referred to in 4 East at p. 171.

A passage occurs in Archbold, at p. 1106, which is this: "But before you give in evidence the acts of one conspirator against another, you must prove the existence of the conspiracy, that the parties were members of the same conspiracy, and that the act in question was done in furtherance of the common design." This seems entirely logical to me, but no decided case seems to be cited by the author precisely supporting it.

In *King v. Bowes*, cited in 4 East 171, the learned Judge said: "The trial proceeded upon this principle; where no proof of actual conspiracy embracing all the several conspirators was attempted to be given in Middlesex, where the trial took place, and where the individual actings of some of the conspirators were wholly confined to other counties than Middlesex; but still the conspiracy as against all having been proved from the community of criminal purpose, and by their joint co-operation in forwarding the objects of it, in different places and counties, the locality required for the purpose of trial was holden to be satisfied by overt acts done by some of them in prosecution of the conspiracy in the county where the trial was had."

That case seems to indicate very plainly that where there is no direct evidence of the fact of conspiracy the acts of each and every of the alleged conspirators can be given in evidence for the purpose of proving that there was a conspiracy, if such

acts were done apparently in furtherance of the common design.

In the case *Ford v. Elliott*, 4 Exch. at p. 81 (where, however, the real question was one of fraud), Alderson, B., said: "It is a mistake to say that a conspiracy must be proved before the acts of the alleged conspirators can be given in evidence. It is competent to prove insulated acts as steps by which the conspiracy itself may be established." I also refer to the language of Williams, J., in *The Queen v. Blake*, 6 Q.B., at p. 139, which is to the same effect.

The subject is treated of in Wright on Criminal Conspiracies, Bl. ed., commencing at 212. Very clear and forcible language on the subject is used by Judge King in *Commonwealth v. McClean*, 2 Parson (Pa.) 368.

After having examined the authorities on this subject that were referred to at the bar, I am of the opinion that a statement made by one of the Counsel for the Crown, so far as it goes, correctly expresses the meaning of the law on the subject. It was this: "Wherever the writings or words of any of the parties charged with or implicated in a conspiracy can be considered in the nature of an act done in furtherance of the common design, they are admissible in evidence, not only as against the party himself, but as proof of an act from which inter alia the jury may infer the conspiracy itself."

It is, of course, different where the writings or words amount to an admission merely of the person's own guilt, and cannot be deemed an act in furtherance of the common design.

The mode adopted in the present case to prove the alleged conspiracy was by proving acts from which it could be inferred or deduced by the jury.

The defendant Nicholas K. Connolly was the managing member of the firm Larkin, Connolly & Co. Robert McGreevy was a member of that firm, and so far as one sees, he was, at all events in some sense, the medium of communication between that firm and his brother, the defendant Thomas McGreevy, who was a member of the Quebec Harbour Commission, and also a member of the House of Commons of Canada.

Large contracts were to be given by the Harbour Commission, through the Government, for the improvement of the harbour in various ways; the Harbour Commission, as to part at least, giving debentures and the Government furnishing or paying the money.

The defendant Thomas McGreevy was necessarily a considerable portion of his time in Ottawa, and there were interviews there between him and his brother Robert.

I have perused, with as much care as I have been able, the evidence and the correspondence respecting the contracts that are shewn to have been awarded to the firm, Larkin, Connolly & Co., the tenders that were made for or in respect of the same, what was done in regard to these tenders, and what was done with a large amount of the moneys received by that firm as payment to them for work done upon the contracts.

I do not, however, intend going through this evidence here, for it is so long that it may be said to be almost endless. I deem it necessary to refer to only one of the contracts, the tenders for the same, etc., and this in a brief manner. As shewn by the evidence, there were four tenders for this contract, which is called the "cross wall contract": one by Gallagher, one by Beaucage, one by Peters & Co., and one by Larkin, Connolly & Co. There was another tender, that of Samson & Samson, but it seems to have been so much higher than the others that little is said about it. Robert McGreevy's evidence shews that he, on behalf of Larkin, Connolly & Co., was the real owner of the tender put in by or in the name of Beaucage, and that Gallagher's tender was in the interest of Larkin, Connolly & Co.

He says there was a meeting (of the members of the firm, or most of them, I presume), in the office of Larkin, Connolly & Co., at the preparation of those three tenders. In each of those tenders, there occurred an error, in respect of the sheet-piling. The error in each was the same error. The errors were the same according to the evidence of Robert McGreevy, except a little variation in price, and they (the errors) were in tendering for this part of the work at a price per lineal foot,



measuring lengthwise of the piles to be planted or driven, instead of lengthwise of the piling (which was to be eight feet thick) when the work was complete. The tenders as to this part were about twenty-six cents per lineal foot, and the witness says that the proper price per foot measured along the line of the work when done would be about ten dollars per lineal foot.

These tenders had to be worked out upon the quantities in the office of the department at Ottawa, "moneyed out" as it was called, and in doing this, there would manifestly be a very wide difference between the result when the price is applied to the lineal foot of piling, and when it is applied to the lineal foot of the work when completed; and by obtaining the correction of such an error, a large difference would be made in the price of the work. It is also manifest that in "moneying out" tenders put in with such an error, they would appear to be lower than really intended, and might, for this reason alone, be considered lower than tenders of other people.

A photograph of a memorandum proved to be in the handwriting of the defendant, Thomas McGreevy, in respect of these tenders is put in evidence.

It is: "Sheet-pilings totals.

"Peters, \$20,000, or \$8 per running foot.

"Sampson, \$26,000, or \$10.50 per running foot.

"Larkin & Co., \$500, or 25 cents per running foot."

Robert McGreevy is asked if he had any correspondence with his brother Thomas McGreevy in reference to this matter, and he answers: "I think so."

A letter is then put in. It is dated Ottawa, 5th May, 1883, and is from Thomas McGreevy to Robert McGreevy. Amongst other things it contains this: "The tenders for cross wall only arrived yesterday and are locked up till Monday, when he will commence his calculation. I will write you Tuesday and let you know the result. Larkin was here yesterday. I told him it would be useless to get Peters out of the way, as it would be tantamount to giving the contract to the highest tender, that you would have to stick to Beaucage's tender, as it was fair."

Another letter of the 7th May, 1883, "House of Commons, Canada," from Thomas to Robert McGreevy, says: "I hope to let you know to-morrow about the result of cross wall tenders. Have your arrangements with Beaucage before the result is known. I will give you timely notice."

In a letter written from the House of Commons on the 8th May, 1883, Thomas McGreevy says to Robert: "I seen Boyd" (the engineer) "this morning. He has not finished cross wall yet. I will meet him this afternoon about it and know the result."

And in a letter of the 17th May, 1883, written from the House of Commons, Thomas McGreevy, amongst other things, says to Robert McGreevy: "As I told you yesterday to try and get a good plan as quick as possible, in answer to letters that Gallagher and Beaucage will receive about their tenders, to bring them over L. & C., so as their tender will be the lowest. The contract will be awarded from Ottawa, direct. \* \* I think you were wrong in tendering without a cheque, accepted by such a pair of cut-throats."

On the same day, the 17th of May, 1883, a letter was or had been sent by Perley, the chief engineer, to the tenderers, calling attention to the mistake or supposed mistake in the tenders, and asking, amongst other things, if an error had really been made, and if so, requesting them to state a price per lineal foot in the line of the work.

There can, I think, be no doubt that this is the letter referred to in the one of Thomas McGreevy of the same date, where he refers to the letters that Gallagher and Beaucage will receive about their tenders.

On the 21st of May, 1883, Beaucage or Robert McGreevy for him, answered Perley's letter, acknowledging the error in the tender, and referring to it as a very serious one, and stating prices per lineal foot, varying according to the thickness of the sheeting from \$15 to \$19 per foot.

There is a letter without date written from the St. Louis Hotel by Robert McGreevy to Murphy, asking him to send Connolly over "to-morrow morning," to send a letter to Perley for Gallagher in answer to one sent him on the 17th by Perley, asking an explanation on piles.

There is a letter to the secretary of the Public Works, apparently from Gallagher, and bearing date the 16th of May, 1883, withdrawing Gallagher's tender, on condition of the deposit cheque being returned.

Robert McGreevy says that the defendant, Nicholas Connolly, was a party to the withdrawal of this tender. He also says that the interview referred to in the letter from his brother Thomas of the 17th May took place in Ottawa.

On the 4th of May, 1883, Beaucage signed a document by which he agreed to transfer all his rights in his tender (which was dated the 2nd of May, 1883) to Larkin, Connolly & Co., for the expressed consideration of \$5,000. This was the position of Beaucage, and it appears from Gallagher's evidence and otherwise that he knew nothing whatever of the tenders, that his name was simply used by Larkin, Connolly & Co.

The evidence on this immediate subject need not, I think, be further pursued. It seems entirely plain that all this manipulation of and in respect to these tenders was for the purpose of bringing out Larkin, Connolly & Co.'s the lowest, and lower than that of Peters & Co., which would be done by their not seeking to make any correction respecting the price of the sheeting, and that much that was done after the interview between Robert and Thomas McGreevy in Ottawa on the 16th of May, and after Thomas' letter of the 17th May, was in pursuance of the instructions in that letter, to try and get a good plan as quickly as possible in answer to letters that Gallagher and Beaucage were to receive about their tenders to bring them out over Larkin, Connolly & Co.'s tender, so that Larkin, Connolly & Co.'s tender would be the lowest.

The plans that were adopted succeeded, and the contract was awarded to Larkin, Connolly & Co. The outcome, in a financial point of view, is shown by the evidence of Jennings, and referred to in the judgment of the Chancellor.

It appears that a "large sum in excess" of what Peters & Co. tendered to do the work for was paid Larkin, Connolly & Co.

As soon as the contract was executed, or very soon thereafter, promissory notes amounting to no less a sum than \$25,000 were made by the firm, Larkin, Connolly & Co., and given to Robert McGreevy, to be given by him to the defendant Thomas McGreevy, and Robert says to the best of his recollection he gave these notes over accordingly to the defendant, Thomas McGreevy; and he says he does not know of the firm getting anything in the way of commercial value for this sum. He says that part of this sum went to pay a judgment debt of the defendant Thomas McGreevy of \$17,000, and that he, as a partner of Larkin, Connolly & Co., was made to contribute his share of this sum of \$25,000.

There was also a sum of \$22,000 and another sum of \$25,000 that went from Larkin, Connolly & Co. to the defendant Thomas McGreevy, and when Robert McGreevy is asked if he had any idea of what the defendant Thomas McGreevy did for the sum of \$72,000, he said he had an idea that he did all he could for the firm, and further on, being asked what did he, Thomas, do for the firm, he answers: "Well, he did a good deal by way of advancing their interests in Ottawa."

There is a large volume of evidence respecting this and other matters, but I do not think it needful to pursue it further, except to point out that it is shewn that Robert McGreevy put into the firm a very unimportant sum towards the necessary capital, and did little or no work, and yet received a very large sum as his share of the profits arising, whilst he was a member of the firm, out of which he paid or gave to the defendant Thomas McGreevy no less a sum than \$58,000, and that the defendant Thomas McGreevy received directly from the firm Larkin, Connolly & Co. the sum of about \$117,000, and that according to the evidence of Robert McGreevy, so far as he knows, no commercial value was given for either of these sums. From all that appears, one would say that it is fair to suppose that if such commercial value had been given, Robert McGreevy would have been aware of it, and it nowhere appears that any such value was given.

There is, as I have said, much more evidence, and there

are many more subjects upon which evidence was given. But if it were assumed that there were only the facts and the evidence I have alluded to, could it be said that there was not evidence to go to the jury, from which they might reasonably infer the existence of the conspiracy? I am unable to perceive (saying nothing at present as to the venue for trial) how the case could have been properly withdrawn from the jury for want of evidence to support it.

This first paragraph of the case goes on and says "that no overt act in Ontario, \* \* had been shewn." This seems to me to presuppose that the agreement, combination or conspiracy charged, took place, if at all, outside of the County of Carleton, and outside of Ontario, presumably, I apprehend, in Quebec, and to presuppose further and indirectly admit that in such case, if there had occurred an overt act in the County of Carleton, that would be a proper place of trial.

The case seemed to proceed, at least so far as the argument before us had concern, upon this view, and looking at it in this way I am of opinion that each of the four letters written and sent from Ottawa by the defendant Thomas McGreevy—one on the 5th May, 1883, one on the 7th May, 1883, one on the 8th May, 1883, and one on the 17th May, 1883, three of which indicate that they were written in the House of Commons—was an overt act, which took place in the County of Carleton; that each of these letters being in the nature of an act done in furtherance of the common design was properly admitted in the first place as an act, from which, with other acts, the jury might infer the conspiracy itself; that each of them is evidence, not only against the writer of them, but against the co-conspirator or co-conspirators, and that each of them is an overt act, as above, done in the County of Carleton, and in this view, and this being so, the County of Carleton was a proper place for the trial.

But I do not perceive why it should be assumed that the conspiracy took place outside of the County of Carleton. For its very existence it is left to be inferred by the jury from

other facts. No evidence is given to shew where it took place, and the jury have not found that it occurred at any particular place. It is neither found nor proved that it occurred outside of that county, and it might well have occurred in the city of Ottawa, within that county. The pleading of the Crown does not, as I read it, shew or charge that the act of conspiracy alleged took place outside of that county any more than it does that it took place within that county, and the Crown brings the proceedings and goes to trial in that county.

If it were assumed that the fact of the combination or conspiracy occurred in the County of Carleton, there would be no room for discussion as to venue or overt acts in relation to it. Besides, if it be considered that the indictment in this respect should have been different, it is a pleading that was amendable.

2 and 9. The second and the ninth paragraphs of the case have reference to certain evidence of Robert McGreevy, and for purposes here they may, to an extent, be taken together. For some reasons, no doubt good ones, the trial proceeded upon the whole of the twenty counts in the indictment, and the finding is in respect of all these counts. In some of these counts Robert McGreevy, and the others named in these paragraphs, are charged as conspirators. It is not necessary that all the alleged conspirators should be prosecuted at the same time. What is done or said by those that are not prosecuted, if it appears to be in furtherance of the common design—the conspiracy—is evidence admissible, not only against themselves, if they were prosecuted, but against any of the conspirators who are prosecuted. For these reasons the evidence of Robert McGreevy, so far as it disclosed anything in furtherance of the common design was, I think, admissible; and I think one searches in vain through the evidence alluded to in these paragraphs for evidence not so admissible, for items of such evidence which can be said to have occasioned substantial wrong or miscarriage.

3. As to the third paragraph of the case, I think this falls under the principle of the case of *Blake v. The Albion Life Assurance Society*, 4 C.P.D. 94, and that the evidence was properly enough admitted.

4. As to the fourth paragraph of the case, it seems to be quite correct that the letters were received in evidence and that the undertaking of counsel regarding them was not redeemed. But one cannot fail to see by the evidence that the true position, authorship and character of these letters were fully disclosed, and that in that light they were good evidence. Counsel seems merely to have been disappointed by the evidence of Gallagher. The letters became during the trial, evidence, proper to be received, as I think.

5. When one sees the position occupied by Mr. Perley, the chief engineer, the report alluded to appears, as I think, to be one of those things that the alleged conspirators desired to be sent in as a step towards the accomplishment of the ultimate object or purpose, and for this reason, if there were none other, I cannot see that it was improperly admitted.

6. The entries in the books referred to in the sixth paragraph were not, it is true, made by the defendant Connolly, but, as it appears he signed the yearly audit of these books, such audits shewing the alleged improper and spurious disbursements made by his firm.

The statements of the witness Cross, taken from the books, appear to have been received as secondary evidence on account of the books not having been produced pursuant to the undertaking of counsel for the defendant Connolly, as well as the other defendant. It is said that the books were, after going into the custody of the defendant Connolly and others, withheld. I do not desire to make any remarks as to this. I do not, however, think that the defendant Connolly has any real ground of complaint in respect of the reception of this evidence.

The books would not, in the usual course, be evidence against the defendant, McGreevy. They shew, as it appears, payments of large moneys which it was suggested went to

the defendant McGreevy in part. But apart altogether from these books, it was proved, one may say almost indisputably, that no less a sum than \$117,000 went directly from this firm to him, the defendant McGreevy, and assuming that the books were not as against this defendant strictly admissible, one cannot, as I think, see that their reception was productive of substantial wrong.

7. The depositions referred to in the seventh paragraph were put in as against the defendant Connolly. This course seems to be justified by the decision in *The Queen v. Coote*, L.R. 4 P.C. 599. He did not, in the Exchequer Court, object when the questions were asked him, so as to bring himself within the exception, which, in *The Queen v. Coote*, is said to be the only exception. Then as to the defendant McGreevy, the contents of the depositions became evidence, when on his cross-examination, the defendant Connolly virtually said that the depositions were true in all respects.

8. As to the eighth paragraph, I do not see any fatal objection to the evidence of the witness W. T. Jennings, looking at it as evidence of an expert. True he made many calculations, some of which appear to have been of a tentative character, but some of them, so far as I can see, were otherwise, and based on solid foundation.

9. As to the ninth paragraph, in addition to what I have before said respecting this paragraph, I may say that I am of the opinion that the agreements, understandings and payments referred to, were matters not improper to be placed by evidence before the jury as casting further light upon the subject under consideration, if it is conceded that they were of any importance for or against the defendant.

10. As to the tenth paragraph, I am of the opinion that the course pursued by the learned Judge was the correct one.

11. As to the eleventh paragraph, the word "unlawful" has various significations. The putting in of several tenders as appears to have been done in this case, seems to me to be insincere, untruthful and fraudulent, and most certainly intended to deceive the parties to whom the tenders are given, and very possibly a person would not be permitted to retain



and hold a pecuniary advantage gained by such means. The learned Judge did not tell the jury that the act was an indictable offence, or in so many words that it was a criminal act. I am not prepared to say that the learned Judge was in error or so far in error as to constitute a sufficient reason for giving effect to the defendant's contentions.

12. This paragraph is as to the order of the addresses of counsel. The case was in this way peculiar. The defendants were tried together. At the close of the case for the Crown, the defendant McGreevy announced his intention not to call any witnesses, but the other defendant did call witnesses or a witness. What the learned Judge did say in ruling, was this: "As Mr. Justice Taschereau puts it, the statute has not been substantially changed. I think we will follow the old practice as a convenient one." I do not see that we should interfere on this ground: section 661 Code.

MEREDITH, J.—

Upon the bold, plain and undenied main features of this case, any twelve men might very reasonably find that the defendants had expressly or tacitly conspired with other persons to obtain by improper and deceitful means large sums of the public funds; and that the conspirators very successfully carried out their scheme and effected their purpose; though this would be only an aggravation of the crime, which was the conspiracy alone: and they might also have reasonably found that the conspiracy was in fact entered into at Ottawa.

And, that being so, there seems to me to be no difficulty in upholding the verdict: but nothing would be gained by my dealing in detail with the many minor points reserved: that has already been twice done: I can usefully add nothing more to all that has been said, in the judgments just delivered, respecting them.

I desire, however, to guard against seeming to assent to the proposition that where a conspiracy is entirely formed in one Province it may be properly tried in any other Province in which a mere overt act is alleged to have been committed

by any one of the conspirators. The question is one of jurisdiction as well as of venue ; but even if it affected only the place of trial, it is, in my opinion, a question at least worthy of careful consideration, notwithstanding the statements upon the subject contained in the text books, and the judgments in some cases in the Courts of the United States of America, all of which seem to be based upon the case of *The King v. Brisac*, 4 East, 164, in which, however, it was not necessary to determine the point, and it was not determined : it is more worthy of such consideration, where, as here, the question is one of jurisdiction as well, and having regard especially to the provisions of the Criminal Code, section 640, and the different constitutions of the Courts of the several Provinces, the different laws respecting property and civil rights in them (a conspiracy to do a civil wrong being in most cases a crime), the great extent of this Dominion, and the provisions for the trial of criminal cases by mixed juries in some of the Provinces only.

It may fairly be asked whether the case of treason, so much relied upon, is an analogous case ; for in treason there is, generally, no crime without an overt act ; while in conspiracy the crime is complete without any overt act beyond the act of conspiring, which alone is the crime.

And it may be suggested that perhaps the crime of conspiracy is sometimes confused with the crime conspired to be committed, or the wrong conspired to be done : an entirely different offence.

The consequences of holding everything everywhere done in furtherance of the objects of the conspirators is a new conspiracy or a renewal of the old one seems to me somewhat far-fetched ; the result might work grave injustice, and must be unsatisfactory upon the question of jurisdiction.

It would surely be a thing to be regretted, if there could be several trials and acquittals and convictions, under different jurisdictions, for in reality, in common sense, the one crime ; also if, for one instance, persons all and always residents in the Province of British Columbia could be in the Province of Prince Edward Island charged with, and brought

to trial upon a charge of conspiracy, alleged to have been committed in the former Province, to do an alleged civil wrong there, solely because someone alleged to have been authorized to do so is alleged to have written, in the latter Province, a letter alleged to have been in furtherance of the alleged object of the alleged conspirators.

The law is certainly not so clear that the question, when it arises, may not be thoroughly dealt with upon its merits.

But this case does not call for a consideration of the question; it was not reserved; nor intended to be; nor would be, as the learned trial Judge has stated; and, as I have already mentioned, there was evidence upon which the jury might have found, if the question had been submitted to them, that the conspiracy, in part at all events, was formed within the jurisdiction of this Court, and within the county in which the case was tried, and that was sufficient to found jurisdiction there.

Judgment supplementary to that of Meredith, J.

BOYD, C.—

In view of what my brother Meredith has said I think it advisable to read a supplementary judgment.

The question of locality of the conspiracy for the purpose of Provincial jurisdiction is not, in truth, before us. It was not raised in pleadings nor broached in the Court below at the trial or before the learned trial Judge. Consequently it does not appear upon the points reserved, though they were not stinted in number, nor was it advanced in the elaborate and minute argumentation of the case before this Court of Appeal. I must assume, not that the point was overlooked, but considered and passed over in silence, because not relied upon.

The only way in which it could possibly be now entertained would be in respect of a new trial in order that the question of jurisdiction might be raised. *Non constat* upon the present evidence that the *locus* of the conspiring was not within Ontario, *e.g.*, at Ottawa, for the evidence while

establishing the agreement by reason of the overt acts does not localize the initial agreement or common understanding. There is enough in the case to justify a finding that the common purpose was entered into at Ottawa, through Robert McGreevy as the intermediary with his brother Thomas, for Robert says he represented the claims of the firm to Thomas in writing and in speaking to him, *i.e.*, at Ottawa. Apart from this, a new trial is not sought on this ground.

But had the point been before us or were it properly open for consideration, I should say it ought not to prevail. The matter was apparently suggested by the proviso in section 640 of the Code: "That nothing in this Act authorizes any Court in one Province in Canada to try any person for any offence committed entirely in another Province, except in," etc. (providing for the case of defamatory libel). That is to say, the Code does not authorize an offence committed entirely in one Province to be tried in another.

But there is nothing in the Code to prohibit the trial of conspiracies as they had been under the former law, and the place was defined as in the quotations already given from Starkie. That is, the venue may be where the agreement was entered into, or where any overt act was done in the pursuance of the common design.

Such acts were proved to have taken place in Ottawa by the letters written, and the information procured and transmitted as already detailed. Now the *rationale* of this alternative venue is, that such an act is viewed as a renewal or a continuation of the original agreement by all conspirators. In opposition to what is laid down in the doubtful ruling, in *Regina v. Best*, 1 Salk. 179, the practice is otherwise stated (as found in Starkie and the later text writers), by Grose, J., in 1803, in *The King v. Brisac*, 4 East 164, mentioning with approval *The King v. Bowes*, a decision of 1787 (p. 171).

Of course the crime of conspiracy is complete when the agreement to do the wrong thing or to employ the wrong means is made, though there be no act in the execution of the design, and then the place of trial is single and must be

where the offence is complete. But if the matter goes beyond intention and agreement and passes into execution in other localities, and then the conspiring mind manifests itself wherever any overt act is done, and the offence is thereby extended and continued elsewhere. This offence was not "committed entirely" in the Province of Quebec, even if the original concerted purpose was formed in the city of Quebec, when that purpose was carried forward into overt acts in the city of Ottawa and Province of Ontario. Provincial jurisdiction in Ontario then attached, and the case does not fall within the words or meaning of the Code.

The counsel who argued *The King v. Burdett*, 3 B. & Ald. at p. 737, said: "Conspirators may undoubtedly be tried for a conspiracy, either in the county where the conspiracy originated, or in the county where the conspiracy is proved to have been continued and carried into execution." And again at p. 738: "The overt acts done by some of the party in one county, while the rest may have been absent in another county prove the continuance of the conspiracy in the county where the overt acts were committed."

Mr. Justice Holroyd, in his judgment in this case, as contained in 4 B. & Ald. at p. 138, adverts to the matter and says: As to nuisances and conspiracies: "juries do not confine their verdicts of guilty to such criminal acts or consequences as occur in the county where the conspiracy or the erection of the nuisance is laid and proved, but extend to them such further acts and consequences of conspiracy and nuisance, as may occur or arise in another county; and judgment and punishment are in such cases given and awarded to the full extent of the aggregate offence."

That is a noteworthy expression, the overt acts were not as expressed by some American Judges, matters merely of *aggravation*—they were matters of *aggregation*,—forming in the bulk one aggregate offence; and as to which, of course, there might be different localities.

In the same case (decided 1820), Abbott, C. J., com-

ments upon and approves of *The King v. Brisac*, and *Regina v. Bowes*, at p. 178, and points out that treason and misdemeanour are alike distinguishable from felony, at p. 179 on the ground that each act is an offence of the same species with every other, and with the whole, and then proceeds, "if any such part of the entire misdemeanour be proved to have been done in the county in which the indictment is preferred, there is enough to satisfy the locality of trial," p. 180.

An author, Woolrych, whose works are examples of accurate research, writing in 1842 on "Misdemeanours," though referring frequently to *Regina v. Best* (as reported in Salkeld and Lord Raymond), does not rely on it as governing questions of venue, but says: "With regard to the county where the offence is to be tried, any one may be selected where an overt act of conspiracy has been attempted," p. 155. For this he cites the cases in 4 East, and refers to the citation of these by the counsel who argued, *Rex v. Johnson*, 6 East 590.

*The King v. Brisac* appears in the seventh volume of Revised Reports, p. 551, and is there at p. 557 noted as being quoted from by the Judge in *Mulcahy v. The Queen*, L. R. 3 H. L. 306, 317. That case therefore I take to be of well recognized and unimpeachable authority, whereas the other case, as found in 1 Salkeld, is not, I think, correctly reported, having regard to the following considerations: The case was decided in 1704-5, and was reported in the folio of 1713, now known as sixth Modern, at p. 185, in very great detail, whereas in Salkeld the report is short, irregularly condensed, and the volume containing it was first published after his death in 1717 under the care of Lord Hardwicke, it is supposed.

The statement or *dictum* which appears in *Regina v. Best*, 1 Salk. 174, that the "venue must be where the conspiracy was, not where the result of the conspiracy is put into execution," is not found in any of the contemporaneous or concurrent reports of the case, : see 2 Lord Raym. 1167; Holt 151 : and 6 Mod. case 186. This last contains the most de-

tailed report of the case, and from it it appears that the passage given as judgment in 1 Salk. was the argument of counsel, citing from the Year Book (42 Edw. III. pt. 15). These are the words of plaintiff's counsel: "In the Year Book, a conspiracy laid in one place to charge with a fact in another county and the venue came from the county where the conspiracy was laid." Reports of *The Queen v. Best* are also given in 6 Mod., pp. 137, 138.

In point of general accuracy the 6th Modern ranks high among the better class of old reports: see Wallace on Reports, 227; but the Court did not think very highly of 1 Salk. in 5 Taunt. at p. 190.

Taking, however, the cue supplied by reference to the Year Book, of 42 Edw. III. (found both in Salkeld and 6th Mod.), it can be demonstrated the law referred to assists the position I now take. That Year Book is *inter alia* cited in *Bulwer's Ca.*, 7 Rep. 1 b, to sustain the following text: "If two conspire to indict a man in one county, and they by their malicious prosecution make the execution of their conspiracy in another county, and there cause the party to be indicted, the plaintiff may have his action of conspiracy in which county he will, for they put their conspiracy in one county in execution in the other \* \* . But if they conspire in one county, by force of which conspiracy without any other act by them, he is indicted in another county, then the writ ought to be brought in the county where the conspiracy was, for the defendants have done nothing in the county where the indictment was, nor were parties nor privies to the finding of the indictment, but only by the conspiracy in the other county."

The conspiracy in this case was a crime against the common law of the Dominion of Canada, and might, in my opinion, be prosecuted in any Province where an overt act was committed, so that no question of jurisdiction can upon the facts or law arise.

For these reasons (which are given without the advantage

of hearing counsel) I would not entertain any possible objection that the proper place of trial has not been selected.

FERGUSON, J.—

I agree in the conclusions of the Chancellor.

**Note:** *Conspiracy—Form of indictment—Particulars.*

See note to *R. v. Defries*, ante pp. 215, 216.

*Indictment of one conspirator only—Unsuccessful conspiracy.*

See *R. v. Frawley*, ante p. 253.

*Criminal Conspiracy—Definition of—Intention and agreement.*

See note, ante p. 262.



## [COURT OF QUEEN'S BENCH, MANITOBA.]

BEFORE TAYLOR, C.J., KILLAM AND BAIN, JJ.

## THE QUEEN v. HERRELL.

*Liquor License — Evidence — Proof of Prior Conviction —  
Evidence of Identity of Convicted Party—Disqualifi-  
cation of Magistrate—Bias or Interest—Convic-  
tion—Amendment—Cr. Code 889, 890.*

1. Under the Liquor License Act (Manitoba), which provides that upon a prosecution for a second offence thereunder the accused shall, if found guilty and not before, be asked to admit or deny the previous conviction charged, and also provides that proof of the previous conviction may be made by a certificate of the convicting magistrate in case of denial or failure to answer, the accused must be given an opportunity of meeting the charge of prior conviction.
2. In the absence of an admission by the accused of the fact of previous conviction, it is essential under the Manitoba Liquor License Act that evidence apart from such certificate should be given of the identity of the accused with the person formerly convicted.
3. The magistrate can act only upon evidence adduced and not upon his own personal knowledge as to such identity.
4. The connection of the magistrate with a society, which supplied funds part of which were used to make the purchase upon which the prosecution of illegal sale of liquor was based, because of his being an honorary member of the society but not entitled to take any part in its affairs, is not a ground of disqualification.
5. To authorize the amendment of a conviction under Cr. Code, sec. 889, the court or judge must from the depositions be satisfied that, if trying the defendant in the first instance, the court or judge would have convicted upon that evidence.
6. A conviction for a second offence which is defective for want of proof of any prior conviction should not be amended under Cr. Code, secs. 209, 210, so as to impose the lesser penalty applicable to a first offence, unless the court is satisfied, from a perusal of the depositions and after giving the accused the benefit of any reasonable doubt, that an offence is thereby proved.

ARGUED : June 28, 1898.

DECIDED : July 9, 1898.

This was a rule nisi to quash a conviction by which the defendant had been found guilty of a second offence under The Liquor License Act, and condemned to pay a fine of \$400, and in default to undergo imprisonment for twelve months.

The motion to quash the conviction was based on three grounds:—

- (1) That there was no evidence to sustain the conviction.
- (2) That there was no evidence to prove a previous conviction.
- (3) That the magistrate was disqualified on account of bias and interest.

*R. L. Ashbaugh* for the defendant. There was no evidence to show that the liquor produced at the trial was that purchased from Herrell. There was no accounting for the custody of the bottle between the time of the purchase and the trial. There was nothing to show it was not tampered with. The bottle was identified by a mark, but that did not account for the contents. There was no evidence that the accused was asked to plead to the second charge, that of a previous conviction. There should be a record of all that took place, and it should not be presumed that anything not shown by the record did take place. The certificate produced did not prove that the accused was convicted of a former offence : *Cross v. Watts*, 13 C.B.N.S. 239. There was no evidence to identify the accused. Fieldhouse, the magistrate, was an honorary member of The Women's Christian Temperance Union ; honorary members paid fees and took the pledge. All monies received went into the common fund of the Union. Members of the W.C.T.U. were present at the trial, the prosecutor induced them to go, as he thought it might help to procure a conviction. *Reg. v. Suffolk*, 18 Q.B. 414 ; *Reg. v. Herefordshire*, 6 Q.B. 753 ; *Reg. v. Chapman*, 1 O.R. 582 ; *Ex parte Laughy*, 28 N.B.R., 656 ; *Ex parte Jones*, 27 N.B.R., 552 ; *Royal Aquarium Society v. Parkinson*, 1892, 1 Q.B., 445. If the rule is granted on the ground of bias in the magistrate, then it should be with costs.

*H. A. Maclean* for the magistrate. There was some evidence on which the magistrate might find that the bottle of liquor purchased was the same as the one that was opened by constable Cox, the contents of which were proved to be intoxicating. If there was any evidence, the Court will not

review the decision of the magistrate upon it; *Regina v. Coulson*, 27 Ont. R. 59. A certificate of previous conviction was put in under the provisions of paragraph "b" of section 200 of the Liquor License Act, which provides that the number of such previous convictions shall be provable prima facie by the production of a certificate purporting to be under the hand of the convicting magistrate, etc. In *Regina v. Kennedy*, 17 Ont. R. 161, decided under a similarly worded statute, it was held that such certificate proved not only the number of the previous convictions, but the convictions themselves. It is submitted that no proof of identity of the accused with the person mentioned in the certificate is necessary; that the moment the certificate is produced it is prima facie evidence against the accused, and it lies upon him to show that he is not the person mentioned in the certificate. No evidence of identity was given in this case, but the name of the accused and the name of the person mentioned in the certificate of previous conviction being identical the case is the same as *Ex parte Dugan*, (N.B.) 13 Can. L.T. 249. The conversation that took place between the magistrate and Mr. Skelding during the hearing of the case, according to the magistrate's version, does not amount to more than a mere expression of opinion, and such an expression of opinion will not oust the magistrate's jurisdiction: *Regina v. Allcock*, 37 L.T.N.S. 829; *Regina v. Klemp*, 10 O.R. 157. The magistrate's version of the conversation should be accepted: *Queen v. Farrant*, 20 Q.B.D. 58. The magistrate had no private or pecuniary interest, therefore cases like *Regina v. Allan*, 4 B. & S. 915 and *Regina v. Huggins*, 1895, 1 Q.B. 563; 18 Cox 94 would not apply. The magistrate did not direct or in any way control the prosecution. The information was laid by the constable of the town of Neepawa under instructions received from the mayor of the town, and the Women's Christian Temperance Union had no control whatever over the proceedings. The magistrate was not even a full honorary member of the Women's Christian Temperance Union. He merely on one occasion contributed \$1.00 to the funds of the Society and was thereupon made an honorary member, but he never took

the pledge nor attended any meeting of the Society. His position, therefore, is very different from that of the magistrate in *Regina v. Simmons*, 14 N.B.R. 159. There the brother of the magistrate was a witness and interested in the prosecution. It may be the magistrate was held to be disqualified on the ground of relationship to the prosecutor. The interest to disqualify must not be such as arises merely from the performance of a public duty : *Regina v. Pettitmangin*, 9 L. T.N.S. 683 ; *Regina v. Justices of Huntington*, 4 Q.B.D. 522 ; *Queen v. Justices of Dublin*, 1894, 2 Irish R. 527.

TAYLOR, C.J.—

Three objections are taken by the rule. The first of these is, that there is no evidence to sustain the conviction. Under this objection it was argued that there is no evidence to identify the liquor sworn by constable Cox to be intoxicating liquor with the liquor which was in the bottle which the boy delivered to the prosecutor as having been bought by him at the shop of the defendant. The evidence upon this is not satisfactory, but I am not prepared to say there is no evidence on which the magistrate could act, and unless that can be held his finding cannot be interfered with. *Reg. v. Grannis*, 1888, 5 Man. R. 153.

The second objection is, that there is no evidence to prove a previous conviction. The information is laid charging a previous conviction, but the record of the depositions and proceedings before the magistrate contain nothing on the subject. Among the papers returned under the certiorari there is found a certificate which it is claimed is sufficient under section 200 to prove the previous conviction. But there is no evidence proving the identity of the defendant with the person named in the certificate.

The Act provides that, where a previous conviction is charged, if the accused is found guilty he shall then, and not before, be asked whether he was so previously convicted as alleged in the information, and if he answers that he was so previously convicted he shall be sentenced accordingly, but if he deny that he was convicted, or stand mute of malice, or

do not answer directly to the question, the magistrate shall then enquire concerning such previous conviction. The Act then goes on to provide for the proof of the previous conviction by a certificate. But I have no doubt that the magistrate should, as required by the Act, ask the accused as to the alleged previous conviction. He should be given an opportunity of meeting that charge just as much as he must be given an opportunity of meeting the charge of the subsequent offence. And to my mind it is clear that when the conviction is of a second offence with the increased penalties, the proceedings ought to show either that the accused admitted the previous conviction, or that the fact of such conviction and the identity of the accused were both proved. The magistrate has no right to act upon any personal knowledge he may be supposed to have ; he must act upon evidence adduced before him.

*Reg. v. Brown*, 16 Ont. R. 41, was referred to as an authority that the finding of the magistrate as to the previous conviction is conclusive and cannot be reviewed by the court. But the court was dealing with a case in which the right to a certiorari had been taken away and there was no evidence at which the court could look. All it could deal with was—Is the charge one within the jurisdiction of the magistrate? Where there is some evidence of a previous conviction it may be that the court will not go behind the finding of the magistrate as to that fact just as it will not as to any other fact when there is some evidence on which it could be found. It can never be that the finding of the previous conviction is to be taken as conclusive, even although there is no evidence. And here there is a total absence of evidence that the defendant, the particular person then before the magistrate on a charge, had ever been convicted. There is no evidence of identity, and in the absence of an admission of the fact by the defendant that was essential.

The third objection is, that the magistrate was disqualified on account of bias and interest.

The bias is sought to be proved by the affidavit of a per-

son who details a conversation which he says he had with the magistrate during the pendency of the trial, but this seems met by the affidavit of the magistrate. Credence should, I think, be given to his statement of what the effect of the conversation was.

In support of the allegation that the magistrate was interested, it is alleged that the prosecution was at the instance of a society known as The Women's Christian Temperance Union, of which he is an honorary member, and to the funds of which he subscribes. It appears, however, that although this society on one occasion supplied the constable of the town with a small sum of money to be used in taking steps to discover cases of alleged illegal liquor selling, the society are not prosecutors here, but the case was brought by the constable under instructions from the mayor.

It is no doubt important that a magistrate should be entirely disinterested and impartial, but I do not think sufficient is shown to justify the conclusion that the magistrate here had such an interest as to disqualify him. This subject is very well discussed in the judgments of Cotton, L.J., and Bowen, L.J., in the case of *Leeson v. General Council of Medical Education*, 1889, 43 Ch. D. 366.

The question then arises, can this conviction be amended so as to make it a conviction for a first offence? The powers of amendment given the Court are no doubt wide, but I do not see how I can exercise them here.

The 56 Vic. c. 32, s. 1, (Manitoba 1893) has made sections 839 to 909, both inclusive, of The Criminal Code, 1892, apply to all prosecutions and proceedings before police magistrates or justices of the peace under the statutes of this Province. Section 889 of the Code deals with powers of amendment, and from the proviso in that section it would appear that the Court or a Judge may amend "when so satisfied as aforesaid," that is "upon perusal of the depositions satisfied that an offence of the nature described in the conviction has been committed." Now, it is one thing to decline to quash a conviction where there is evidence upon which a magistrate

might convict and another thing to interfere actively and amend a conviction. To do that it seems to me that the Court or Judge must from the depositions be satisfied that if trying the defendant in the first instance the Court or Judge would upon that evidence have convicted. Had the defendant been tried before me I could never have convicted him upon the evidence as it stands.

The conviction should in my opinion be quashed.

KILLAM, J.—

The motion to quash the conviction is based on three grounds, viz. : (1) Disqualification of the convicting magistrate through interest and bias ; (2) Want of evidence of a sale of an intoxicating liquor, due to the alleged failure to identify the liquor produced at the trial, and shown to be intoxicating, with the contents of the bottle furnished by the accused ; (3) Want of evidence of prior conviction of an offence against the Liquor License Act.

The direct evidence of any bias on the part of the magistrate is extremely weak. One Skelding who has made an affidavit states therein that, during the progress of the trial, and before the evidence for the defence had been submitted, he had a conversation with the magistrate who then told him that he would not believe any evidence submitted by the defendant if the parties giving such evidence were connected with the defendant. The deponent then adds that the magistrate is a most pronounced temperance man, and from his knowledge of the magistrate he, the deponent, has no doubt but that in cases for infraction of The Liquor License Act the magistrate decides according to his own ideas rather than upon the evidence.

The magistrate states, by affidavit, that, during the progress of the trial, and after the evidence for the prosecution had been given, Skelding came to his office and in conversation he told Skelding that the evidence seemed clear and that, in defence, he would require more than the denial of the defendant to find an acquittal, but that he did not say that

he would not believe the evidence of anyone connected with the accused, or use words to that effect.

Counsel for the Crown has suggested that the magistrate intended merely to give a friendly warning to a friend of the accused that the latter should not trust to his own denial alone to meet the evidence which seemed so clear. The magistrate has, however, given no such explanation ; and, unexplained, the incident does not seem in keeping with a due sense of his position ; but I cannot find in his expression of opinion as to the effect which the denial of the accused would have upon his mind anything to show that he was not prepared to decide impartially according to the evidence. Mr. Skelding's opinion as to the magistrate's bias cannot weigh with the Court.

A more important point is that relating to the connection of the magistrate with the Women's Christian Temperance Union, and that of the society with this prosecution.

The treasurer of the society furnished the informant, the town constable, with funds for use in the enforcement of The Liquor License Act. According to her evidence and her report to the society, the money was to be used to "work up" cases. After she had thus reported the payment her act was ratified by the society.

The constable claims to have expended money in the purchase which formed the subject of the prosecution, and in expenses connected with the procuring of the purchase, and he claims to charge this expenditure against the fund supplied by the society.

He laid the information with the concurrence of the mayor of the town, and the prosecution was really conducted by the town authorities. But, upon the suggestion of the constable, a number of members of the society attended the trial for the purpose of giving the prosecution their moral support. If this was done with the expectation of influencing the magistrate's decision, it was a wholly inexcusable attempt to interfere with the course of justice and an insult to the magistrate himself.



But the magistrate's connection with the society seems to have been only nominal. He was on the roll as an honorary member, in consequence of his having advanced \$1 towards a lecture fund. He took no part, and he was not entitled to take any part, in the conduct of the society's affairs. He knew nothing of even this indirect connection of the society with the prosecution, except what was brought out before him on behalf of the defence in the course of the trial. He had no pecuniary interest or responsibility in respect of the prosecution. The charge was one of an infraction of a general public statute, not affecting any private interest with which he was in any way connected.

The case in many respects resembles *Reg. v. The Mayor and Justices of Deal*, 1881, 45 L.T.N.S. 439, in which it was claimed that justices who were members of a local branch of a humane society, at a distance from the home office, were disqualified from sitting at the hearing of a charge of cruelty to an animal, laid and prosecuted by the chief secretary of the society. It appeared that the local branches had nothing to do with such prosecutions, or with the appointment or conduct of the secretary, or with the general management of the society, but that the prosecutions were conducted by the secretary on his own responsibility. It was held that the justices were not disqualified.

In *Reg. v. Pettitmangin*, 9 L.T.N.S. 683, a magistrate who was a member of a committee of a town council, which committee had instructed the local police to see that public houses were conducted properly, but to submit charges to the law clerk before prosecuting, was held not disqualified from sitting at the hearing of a charge laid in pursuance of these instructions.

In the case of *The Queen v. The Justices of the County of Dublin*, 1894, 2 Irish R. 527, the question was as to the disqualification of a member of a committee of the grand jury of the county to sit at the hearing of a charge of obstructing a highway laid by an officer of the grand jury in pursuance of instructions given him by this committee to have this

particular obstruction removed, but the justice had not been present at the meeting at which the instructions were given and knew nothing of them. It was held that he was not disqualified.

In *Leeson v. General Council of Medical Education*, 1889, 43 Ch. D. 366, it was held by North, J., and by the majority of the Court of Appeal, that two members of the Council were not disqualified from sitting upon the hearing of a charge of infamous conduct made against a member of the medical profession by the managing body of a society on account of their being members of this latter society, though not of the managing body.

Now these cases appear to establish that, where the magistrate has no pecuniary or private interest in the subject matter of the controversy and there is no sufficient evidence of actual bias, the question is whether he is so far connected with one of the parties as to be adjudging in what is directly or indirectly his own cause. In my opinion there was no such connection in this instance.

This Court is not a court of appeal from the convicting magistrate. We cannot quash the conviction for being made without evidence unless there was a complete absence of any evidence whatever of the commission by the accused of the offence charged ; and we are not to go over the depositions with the point of a pin to search out some small break in its continuity. A bottle was sworn to have been delivered by the accused at his shop to a witness in response to a note handed him by the witness who also paid him a sum of money. The evidence is that the bottle, when so delivered, was sealed and had upon it the label, "Imperial Whiskey." The bottle is traced about and identified with one produced at the trial by evidence that may appear to different minds more or less cogent. It is sworn that the contents of the one produced at the trial are whiskey and are intoxicating.

Upon this evidence this Court cannot presume to disturb the finding of the magistrate, that the bottle said to have been delivered by the accused to the witness contained an

intoxicating liquor when so delivered, and was so delivered in pursuance of a sale of the liquor to the witness or to the latter's employer.

I am, however, of opinion that there was no evidence before the magistrate of the commission by the accused of a prior offence against The Liquor License Act.

Section 151 of the Act provides that any person who sells or barter liquor of any kind without the license therefor required by law, shall be liable to a penalty for the first offence of not less than \$50 nor more than \$250, and in default of payment to imprisonment for not less than two months nor more than six months; and for a second offence a higher penalty and longer imprisonment are authorized.

The fine and imprisonment imposed in the present case were greater than could be imposed for a first offence, and if the magistrate acted without evidence of the former conviction he exceeded his jurisdiction.

The decision in *Reg. v. Brown*, 1886, 16 Ont. R. 41, turned on the point that the right to certiorari had been taken away, and that in such a case the Court could not enter into the consideration of the question whether there was any evidence of a former conviction provided the magistrate had jurisdiction to adjudge upon the question.

Upon the argument of the application, I was strongly of opinion that the certificate of a former conviction was insufficient upon its face.

By section 200, sub-section (b), of the Act, the *number* of previous convictions may be proved by a certificate purporting to be under the hand of the convicting magistrate. It was argued that it is the number only, and not the fact, of the previous convictions that can be thus proved. This is to make the clause an absurdity. If the convictions are proved in fact, the magistrate trying the case does not need any certificate to enable him to count the number.

The certificate must show on its face that there has been a conviction of an offence of the requisite character. The Act gives certain forms of convictions and of descriptions of

offences in certain proceedings, but it does not follow that the same language in the certificate has the same meaning or shows a prior conviction of an offence against the law.

The certificate in this case stated that on, &c., at, &c., Charles W. Herrell was convicted before the certifying magistrate (who was the magistrate who tried this charge) "for that the said Charles W. Herrell," on the 24th day of February, 1897, at, &c., on his premises, "unlawfully did sell liquor without the license therefor required by law."

In itself this would not describe a legal offence, because it is not an offence to sell liquor without a license unless the liquor is of some specified character.

However, the section 151 provides that any person who sells or barter liquor of any kind without the license therefor required by law shall be liable to certain penalties. Section 182 provides that the description of any offence under the Act in the words of the Act, or in words of like effect, shall be sufficient in law, and that certain forms in Schedule K to the Act shall be sufficient in the cases therein provided for. When we look at Schedule K we see it is headed "Description of Offences," and contains a number of paragraphs, each shortly describing an offence and then going on with a manner of setting it out. Thus, (par. 2) "Sale without license." "That X. Y. on the            day of            in," &c., and at            "unlawfully did sell liquor without the license therefor by law required." The schedule does not limit the use of the description to informations, convictions or other documents, but is general.

I think now that this form of description can be properly used in the certificate, especially as it is really in the words of section 151, making the act punishable.

But there was no evidence given of the identity of the accused with the Charles W. Herrell mentioned in the certificate. Counsel for the Crown cites *ex parte Dugan*, 13 Can. L.T. 249, as authority that the similarity of name is some evidence, but we have only a short note of the effect of the decision and no clear report of the circumstances or of the grounds of the judgment.

Such a similarity is not sufficient in ordinary cases of proving prior convictions under the criminal law.

In the case of *The Queen v. George Lloyd*, 1873, 1 Cox C. C. 51, there was the similarity of name, but even with some other evidence it was held that there was not enough to go to the jury on the question of prior conviction.

And as to the suggested personal knowledge of the magistrate, that could not be acted on any more than could the magistrate, seeing Herrell make a sale of intoxicating liquor, turn around and convict him of doing so without taking evidence. There should be sworn evidence of a witness who could be cross-examined, and whose depositions could be taken down in writing.

I regret extremely that I cannot find any method of remedying the defect. The penalty imposed is greater than could be imposed without proof of a former conviction; and, in the absence of statutory authority, this court has no jurisdiction to impose any other penalty.

I consider it a blot upon the administration of justice that solemn proceedings should thus be wholly nullified; and I have studied over and over, very carefully, sections 209 and 210 of The Liquor License Act and sections 889 and 890 of The Criminal Code (made applicable to proceedings under Provincial Statutes by 56 Vic., (Man.) c. 32; s. 1), with the desire to find in them sufficient authority for amending this conviction. I regret to say that I can find none which will avail in the present case.

Section 209 of the former Act validates convictions defective in certain respects, subject to conditions, one of which is that it can be understood from any such conviction that the appropriate penalty or punishment was thereby adjudged. Upon the face of this conviction the penalty was appropriate, but when the adjudication of a former conviction is omitted the penalty was greater than could be adjudged.

The first part of section 210 deals only with applications to quash the convictions validated by section 209, and the power of amendment applies only to convictions "sufficient and valid under this section or otherwise."

Section 889 of The Criminal Code gives a power to adjudicate as to the punishment when that which has been imposed is in excess of jurisdiction ; but this power is subject to the condition that the court is satisfied, upon perusal of the depositions, that an offence of the nature described in the conviction has been committed.

Now, it is one thing to say that upon the face of the depositions there appears to have been evidence which might have satisfied the mind of the magistrate hearing the witnesses, and quite a different thing to satisfy one's own mind, by perusal of written depositions, that an accused person has been guilty of an offence against the law. Not only have we not the advantage of seeing and hearing the witnesses, but we have only the substance of their evidence, or what the magistrate considers as he goes along to be its substance.

In many cases this might be sufficient to satisfy the court ; but here there was directly contradictory evidence, without such collateral circumstances as might enable one to decide between the witnesses. The minds of the members of the court must be satisfied from a perusal of the depositions and we cannot tamely adopt the opinion of the convicting justice. We have in a measure to try the accused upon the depositions, giving him the benefit of any reasonable doubt.

I agree, but, I repeat, with great regret, that the conviction must be quashed.

BAIN, J.—

The depositions returned shew that there was some evidence on which the magistrate might find that the intoxicating liquor produced at the trial had been sold by the accused to the witness Favell ; and it cannot be said there was no evidence to support the conviction for the offence charged on the 27th January.

I do not think we would be justified in holding that the magistrate was disqualified from trying the case on the ground of bias or interest. In his affidavit, he denies that he made the statement attributed to him by Skelding, that he

would not believe any evidence submitted by the accused if the parties giving such evidence were connected with him ; and I cannot consider that the fact that he made such a statement has been proved. The other statements in Skelding's affidavit are too vague and general to justify any inference that the magistrate was or would likely be biased in the trial of the case. It seems clear, also, that the fact that the magistrate was an honorary member of the Women's Christian Temperance Union in Neepawa, was not sufficient, under the circumstances, to disqualify him from sitting on the trial on the ground either of interest or bias. The case against the defendant was worked up and the information was laid by Campbell, the constable of the town ; and in laying the information he acted on the instructions of the acting mayor. And, although the money with which Favell paid for the whiskey that the defendant is accused of selling had been given to Campbell by the treasurer of the Women's Christian Temperance Union, it had been given to him to be used by him at his discretion in working up cases under The Liquor License Act and without any knowledge that any of it was to be used in this particular case ; and neither in buying the whiskey, nor in laying the information, was Campbell acting as the agent or on behalf of the Union. He was the actual, as well as the nominal prosecutor, and it cannot be said that the prosecution was directly or indirectly carried on by the Union. Then it is shewn, also, that the magistrate's membership in the Union is merely nominal. He has never attended any of its meetings or taken any part in its business or management ; and until the trial he had no knowledge that the Union had been urging Campbell to take steps to put a stop to the illicit sale of liquor, or that the money had been given to him to be used for that end.

Now, nothing can be clearer than the principle that a person who has a judicial duty to perform disqualifies himself for performing it if he has a pecuniary interest in the decision or a bias which renders him otherwise than an impartial judge ; *Leeson v. General Council of Medical Education*, 1889, 43 Ch.

D., per Bowen, L.J., p. 384 ; and I fully agree with what Fry, L.J., said in this same case, that it is a matter of public policy that judicial proceedings shall not only be free from actual bias or prejudice of the judges, but that they shall be free from the suspicion of bias or prejudice. But in the case here no actual bias has been proved, and the magistrate could have no pecuniary interest in the result of the trial ; and as a matter of common sense and experience, it does not seem to me that any man of ordinary principle and character in the position of the magistrate would likely be even unconsciously biased by the interest the Women's Union shewed in the case. And that we are obliged to infer bias under the circumstances shewn here seems clear from *Reg. v. Rand*, L. R. 1 Q. B. 230 ; *Leeson v. General Council, &c.*, 1889, 43 Ch. D. 366 ; *Queen v. Dublin*, 1894, 2 I. R. 527 ; *Reg. v. Farrant*, 20 Q. B. D. 58, and *Reg. v. Klemp*, 10 Ont. R. 143.

I think it must be held, however, that there was no evidence that justified a conviction for a second offence. It appears that the accused refused to plead or answer to the charge of having been previously convicted, and thereupon it became the duty of the magistrate, under section 200 sub-section (a), to inquire concerning such previous conviction. The prosecution evidently intended to prove the previous conviction by putting in a certificate of the conviction under the provisions of sub-section (b) of section 200, but I do not think that the certificate that was put in purporting to be under the hand of M. H. Fieldhouse, who is described as a police magistrate, can be allowed to be any evidence at all of a previous conviction under the provisions of The Liquor License Act. The certificate simply states that Charles W. Herrell had been convicted for having on a certain date and at a certain place unlawfully sold liquor without the license therefor required by law. This statement, however, does not shew what it was essential for the prosecution to prove, that the person named had been convicted for selling liquor of a kind the sale of which without a license is prohibited by



The Liquor License Act. This Act prohibits the sale of liquors that are intoxicating. It is true that the interpretation clause (k) of the Act gives the word "liquor" whenever it is used therein the meaning of liquor that is intoxicating, and that by section 183 it is made sufficient in describing offences under the Act to state the sale of liquor simply. But the difficulty with this certificate is that it does not state that the conviction it refers to was under the provisions of The License Act; and as this Act is nowhere mentioned in the certificate, it does not seem possible for us to infer that it was.

And even if the certificate could be held to be sufficient to prove the conviction of the person mentioned in it, I think some evidence of the identity of the accused with the person mentioned would have to be given, before the magistrate could find that the previous conviction had been proved. I presume that the magistrate who signs the certificate is the same magistrate who was trying the subsequent offence. But the fact that the magistrate knew of his own knowledge that the accused was the person named in the certificate could not dispense with proof of the fact by evidence given in the ordinary way. Taylor on Evidence, s. 1379.

The result is that while there was evidence before the magistrate sufficient to sustain a conviction for a first offence, there was no evidence to sustain one for a second offence, or to justify the punishment that has been imposed. There is not evidence, therefore, to support the conviction that has been made; it was made without jurisdiction; and as it cannot be understood from it that the penalty or punishment, appropriate to the offence against the Act that has been proved, has been imposed, I do not think the Court has power to amend the conviction under sections 209 and 210.

By section 180 of The Liquor License Act, and 56 Vic., (Man.) c. 32, the sections of the Criminal Code, 839 to 909, are made applicable to all proceedings under the Liquor License Act, so far as they are consistent with the provisions of the Act. But, assuming that the powers of amending and modifying convictions that are given by sections 883 and 889 of the Code

are not inconsistent with the provisions of the Liquor License Act, these powers are to be exercised only if the Court or Judge is satisfied upon perusal of the depositions that an offence of the nature described in the conviction has been committed. Now, it is one thing to be satisfied from reading the depositions that there was evidence to sustain the finding of the magistrate, and something very different to be so satisfied on reading them as to feel justified in deciding that the accused is guilty and in convicting him. Very possibly if I had heard and seen the witnesses as the magistrate did, I might have thought that their evidence proved the guilt of the accused. But having only the depositions to look at, I cannot say they satisfy me that the guilt of the accused is proved beyond reasonable doubt. The witness Favell says he bought the bottle of whiskey from the accused in his shop on 27th January last, sometime about the middle of the day. But the accused himself says that he was not in his shop that day till after five in the afternoon, and his clerk corroborates him in this. The clerk further says that, although Favell was in the shop that day and wanted to buy whiskey, he did not get any. On the other hand, Campbell says he saw the accused in his shop about fifteen minutes before Favell went in with the note that had been given him, and that he also saw Favell go into the shop and come out with a parcel. The statements of these witnesses cannot be reconciled; and while it might be easy enough for one who heard them give their evidence to decide who of them should be believed, it is impossible to do this merely from reading the depositions.

#### Conviction Quashed.

**Note:** *Prior Conviction—Proof of identity.*

See Note, ante p. 13.

*Magistrate—Disqualification by pecuniary interest or bias.*

See *ex parte McCoy*, ante p. 410, and Note to same.

*Amendment of conviction.*

See *R. v. Coulson* (Ont.), ante 114, and Note p. 118; *R. v. Gavin* (N.S.), ante 59; *ex parte Nugent* (N.B.), ante 126; *R. v. Mines* (Ont.), ante 217 and Note p. 219.

## [COURT OF QUEEN'S BENCH, QUEBEC.]

BEFORE WURTELE, J., IN CHAMBERS.

**Ex Parte ELIZA MAINVILLE.***De facto Judge — Jurisdiction — Failure to take Oath of Allegiance and Oath of Office—Objection by Accused.*

1. All persons appointed to judicial offices in Canada are required to take the oaths of allegiance and of office before acting in their judicial capacity ; and a person temporarily appointed to be Deputy Recorder of Montreal is under the same obligation.
2. If the accused takes objection at the trial to the qualification of the magistrate to act in the case because of his failure to take such oaths, public acquiescence in his exercise of judicial functions will not avail to make his adjudication binding, and he cannot claim to be in the position of a judge *de facto*.
3. The accused convicted under Cr. Code 783 under such circumstances is entitled to be released from custody upon *habeas corpus*.

Petition for discharge under *habeas corpus*.*A. E. Poirier*, for petitioner.*O. Desmarais*, Crown Prosecutor.

MONTREAL, August 15, 1898.

WURTELE, J.—

The petitioner was charged before Mr. Ernest Desrosiers, who was acting as Deputy Recorder of the city of Montreal, with being an inmate of a disorderly house, or house of ill-fame, and was tried by him under the part of the Criminal Code relating to the summary trial of indictable offences. On the third of the present month of August he found her guilty and sentenced her to an imprisonment of six months and a fine of \$100, and to a further imprisonment of six months if such fine was not paid at the expiration of the imprisonment of six months.

She obtained a writ of *habeas corpus* and has been brought before me.

Among other reasons for the quashing of the conviction and commitment, she alleges that the Deputy Recorder had

not taken the oath of allegiance and the oath of office, or judicial oath, when he heard her case and pronounced the sentence against her.

The Recorder of the city of Montreal is appointed by the Lieutenant-Governor in Council, and he has the right from time to time to appoint a duly qualified advocate as Deputy Recorder to act for him in the event of his illness or absence from the city, and such appointment may be revoked and again made, as circumstances may require. The instrument in writing or commission appointing a Deputy Recorder must be deposited and registered in the office of the clerk of the Recorder's court.

The register has been produced before me by the deputy clerk of the Recorder's court, and from an examination of it I find that on the 27th day of June last, a previous appointment of Mr. Desrosiers as Deputy Recorder was revoked, that on the 5th of July last he was again named Deputy Recorder for the time of a proposed absence of the Recorder, and that this last commission was registered on the day on which it was signed.

By the public law of the realm, from the time of the statutes of Edward III. passed in 1344 and 1346, all persons who are appointed to judicial offices are required before assuming authority and acting in their judicial capacity to take the oath of allegiance and the judicial oath. This last oath is to the effect that the person appointed to such an office will well and truly serve the Sovereign in the office to which he has been appointed, and that he will do right to all manner of people after the laws and usages of the realm without fear or favour, affection or ill-will. This is also part of the general public law of the whole Dominion, and consequently is the law of the Province of Quebec.

The taking of these oaths is a condition precedent to the entrance into office. But it has been urged that the Deputy Recorder is not obliged to take these oaths, inasmuch as the charter of the City of Montreal, under the authority of which he is appointed, does not require it. But neither do the

statutes constituting the Court of Queen's Bench and the Superior Court require the judges of these courts to take and subscribe these oaths. They fall, however, under the prescriptions of the public law of the land, and no one would seriously pretend that they can lawfully act before having taken the oath of allegiance and the oath of office; and the same rule must necessarily apply to the Deputy Recorder who is a judge of an inferior rank.

Moreover, the Revised Statutes of the Province of Quebec contain an express provision to that effect in article 603, which enacts that every person appointed to any office shall take and subscribe the oath of allegiance and the oath of office for the faithful performance of the duties of such office; and this provision applies to the Deputy Recorder of the City of Montreal, as he holds a public office under the jurisdiction of the Legislature of Quebec.

By referring to the register containing the appointments of Deputy Recorders which is kept in the office of the Recorder's Court, and also to the register of official oaths kept in the office of the Clerk of the Crown, I find that Mr. Desrosiers has not taken and subscribed to the oaths of allegiance and office as Deputy Recorder since his appointment on the 5th of July last.

But it was suggested that he had assumed the office and was exercising its functions openly and with the acquiescence of the public, and consequently that he was a judge *de facto* and that his judgments were valid and binding. It was, however, admitted at the argument, that the point that the Deputy Recorder had not taken the oaths was raised at the trial of the petitioner, and that his qualification and his right to sit and act in the case had been challenged, that the petitioner had not acquiesced in his assuming the office, and had not admitted any right or power on his part to act, but had in fact contested his qualification and his jurisdiction and power. In so far therefore as she is concerned he was a mere intruder in the office, and he cannot claim to have occupied the position of a judge *de facto*.

He consequently was not qualified, and he had no power to act at the time he tried and sentenced the petitioner ; and as he was without any jurisdiction the conviction rendered by him on the 3rd of August instant is null and void.

I therefore maintain the writ of habeas corpus and quash the conviction, and I order the jailer to discharge the petitioner from custody and to let her go at large.

**Prisoner discharged.**

**Note :** See the next case.

## [COURT OF QUEEN'S BENCH, QUEBEC.]

BEFORE WURTELE, J., IN CHAMBERS.

**Ex Parte THOMAS CURRY.**

*De facto judge—Failure to take oath of office and oath of allegiance—Necessity of objection by prisoner—Validity of adjudication in criminal matter.*

1. The failure of a judicial officer to take the oath of allegiance and the oath of office where he has acted as the holder of the office and has been acknowledged and accepted as the duly qualified incumbent thereof by the public does not invalidate his judgments in criminal cases where his qualification has not been contested at the time of the trial, and such judgments are valid and binding as having been rendered by a judge *de facto*.

MONTREAL, August 22nd, 1898.

*Madore, Guerin and Perron*, for the petitioner.

*Odilon Desmarais*, for the crown.

*Ernest Desrosiers*, in person.

WURTELE, J.—

The petitioner represents that on the 13th day of August instant, he was convicted before Ernest Desrosiers, Esq., who was then acting as Deputy Recorder of the City of Montreal, of loitering; that he was sentenced to three months' imprisonment and to a fine of \$20, and that he is now detained in the common jail, serving the term of his sentence. He prays for the issue of a writ of habeas corpus on the ground that when he was convicted and sentenced the Deputy Recorder had not taken the oath of allegiance and the oath of office, and that consequently he was not qualified to act as such Deputy Recorder.

In the case of *Elisa Mainville* (1 Can. Cr. Cas. 528) I held, on the 15th day of August instant, that as the Deputy Recorder had not taken these oaths, he was not qualified to act, and I consequently liberated the petitioner. It is now contended, while admitting that the Deputy Recorder had not taken the oaths in question when he sat in the present case,

that he, however then occupied the position of a judge *de facto*, and consequently that his judgment is valid and binding. A judge *de facto* is one who exercises the duties of a judge under color of an appointment and whose possession of the office and exercise of its function are acknowledged and acquiesced in by those who appear before him, and by the public; he is one who has the reputation of being the judge he assumes to be, and yet is not a good judge in point of law.

In the previous case, it appeared that the Deputy Recorder's qualification, and right and power to act were challenged at the hearing by the defendant, and that the point was raised that he was not qualified to act, in consequence of having failed to take the oath of allegiance and the oath of office or judicial oath, after his appointment. Such being the case, he ceased to occupy the position of a judge *de facto* as regarded the defendant, and became a mere intruder in the office. His judgment therefore, was not valid and binding as that of a judge *de facto*, and having been rendered by a mere intruder in the office, was illegal and null. Under these circumstances, after it having been ascertained that the oaths had really not been taken, I maintained the writ of habeas corpus, and ordered the discharge of the petitioner.

But in the present case, the Deputy Recorder's qualification was not denied, and his power to act was not challenged by the defendant. While sitting in the case, he was really a "judge *de facto*," and the sentence or judgment which he rendered is therefore valid and binding. This being the case, I cannot grant a writ of habeas corpus, and I therefore reject the petitioner's application.

*Petition refused.*

**Note :** *Officers "de facto" and "de jure."*

See *O'Neil v. Attorney General* (Supreme Court of Canada), ante p. 303 and Note, p. 314.

*Failure to object—Consent of accused as affecting irregularity.*

See *The Queen v. Corby* (N.S.), ante 457, and Note, p. 465.



[POLICE COURT, CITY OF SAINT JOHN, N.B.]

BEFORE POLICE MAGISTRATE RITCHIE.

**THE QUEEN v. DIAS.**

*Liquor License Law—Sale to Interdicted Person after  
Notice—Knowledge of Identity Unnecessary.*

1. A printed notice by a License Inspector in his own name prohibiting the sale of liquor to a particular person under the Liquor License Act, 1896, (N.B.) sec. 110, is sufficient, and it is not necessary that he should serve the identical notice received from the relative of the party to be interdicted, nor that the notice should set forth all that is essential to be proved for the purpose of sustaining a conviction.
2. Knowledge by the liquor dealer of the identity of the person supplied with liquor with the person named in the notice is not necessary in order to constitute the offence specified in said section.

DECIDED : August 26, 1898.

The Liquor License Act, 1896 (New Brunswick) provides as follows :—

110. The husband, wife, parent, child of twenty-one years or upwards, brother, sister, etc., of any person who has the habit of drinking intoxicating liquor to excess . . . may give notice in writing, signed by him or her, or may require the Inspector to give *such notice* to any person licensed to sell, or who sells, or is reputed to sell intoxicating liquor of any kind, not to deliver intoxicating liquor to the person having such habit ; and if the person so notified, at any time within twelve months after such notice, either himself, or by his clerk, servant or agent, otherwise than in terms of a special requisition for medicinal purposes, signed by a licensed medical practitioner, delivers in or from any building, booth or place occupied by him, and wherein or wherefrom any such liquor is sold, etc., any such liquor to the person having such habit, he shall incur upon conviction a penalty not exceeding \$50."

An information was laid under the above section 110 against a license holder for selling intoxicating liquor to an interdicted person after service of a printed notice by the

inspector in the following form with the name of the Inspector printed at the end thereof.

"It having been reported to me that —— has the habit of drinking intoxicating liquors to excess, and being required under Sec. 110 of the Liquor License Act, 1896, so to do, I direct you not to deliver intoxicating liquors to the aforesaid person within a period of twelve months after notice."

*Geo. A. Henderson*, for the informant.

*W. Pugsley, Q.C.* and *A. I. Trueman* for defendant.

ST. JOHN, N.B., August 26, 1898.

THE POLICE MAGISTRATE—

The defendant, Daniel Dias, a licensed liquor dealer is charged under section 110 of the Liquor License Act of 1896, for that he did sell intoxicating liquor to one W—— M——, an interdicted person.

The facts being admitted, the only questions for consideration are (a) whether or not the notice served by the inspector on the defendant is sufficient, and (b) whether the defendant can be convicted under the section, it being admitted by the prosecution that the defendant bona fide believed the person to whom the liquor was supplied was not a prohibited person.

The section of the Liquor License Act of 1896 is similar to the Ontario Act, except that in our law the persons named in the section "may require the inspector to give such notice."

Mr. Pugsley, Q.C., counsel for defendant, contends that the inspector should have served on the defendant the notice he received from the brother of the person to be interdicted. This the inspector did not do; he prepared a notice reciting the request and served such notice with his name printed on it, upon the defendant.

*Northcote v. Brunner*, 1887, 14 Ont. App. 464, is cited as to the insufficiency of the notice; but it can scarcely be taken as an authority. The Court being equally divided the appeal was dismissed. In that case, however, in his judgment I

observe that Mr. Justice Osler was of the opinion, that the ignorance of the tavern-keeper did not constitute a defence; the prohibition, where the circumstances exist being absolute.

I think the notice served on the defendant in this case is sufficient: any of the relations mentioned in the section may give the notice, or any of them "may require the inspector to give such notice." I think the notice in form and substance is quite within the terms of the Act. It is not necessary that the notice should contain all that is essential in the way of proof sufficient to sustain a conviction. It is idle to say the defendant did not understand its import.

The important question is can the defendant be convicted in the absence of knowledge—of guilty mind? The intention of the section under consideration must be gathered from the statute: sections 108 to 111 inclusive are under the head of "Restriction of sale to inebriates." The phraseology in this part of the Act, makes certain offences distinguishable from offences referred to in other sections—where knowledge is made an ingredient. I think the words of section 110 are absolutely prohibitory and exclude the application of the general doctrine of *mens rea*. It seems to me that to give other construction to this and kindred sections in the Act would be to render the enactment nugatory. In such statutes as this, acts are constituted, *ipso facto*, crimes. The Legislature evidently intended some of the prohibited acts, if committed, to be done at the peril of the person who did them.

In section 99 the "occupant" is made personally liable for the acts of other parties done without the authority or direction of the occupant.

*Reg. v. Folsom*—23 Q.B.D. 172, cited by Mr. Pugsley, is one of many bigamy cases, but is a decision under a section entirely different in its provisions from the one now being considered. In that case there were five dissenting judges and Mr. Justice Wills, one of the majority, at page 172 admits that "although *prima facie* and as a general rule there must be a mind at fault before there can be a crime, it

is not an inflexible rule, and a statute may relate to such a subject matter and may be so framed as to make an act criminal whether there has been any intention to break the law or otherwise to do wrong or not. There is a large body of municipal laws in the present day which is so conceived, and enforced by the sanction of penalties; and the breach of them constitutes an offence and is a criminal matter. In such cases it would, generally speaking, be no answer, that the person had bona fide made an accidental mistake or miscalculation. The facts are properly construed as imposing the penalty when the act is done, no matter how innocently, and in such a case the substance of the enactment is that a man shall take care that the statutory direction is obeyed and that if he fails to do so he does so at his peril."

In the same case, Mr. Justice Manisty, one of the five dissenting judges says, "I agree with my brother Stephen in thinking that the phrases "mens rea" and "non est reus nisi mens sit rea" are not of much practical value, and are not only 'likely to mislead' but are 'absolutely misleading.' Whether they have had that effect in the present case, on the one side or the other, it is not for me to say."

Mr. Justice Stephen says "like most legal latin maxims, the maxim on 'mens rea' appears to me to be too short and antithetical to be of much practical value. It is, indeed, more like the title of a treatise than a practical rule."

*Reg. v. Prince*, L.R. 2 C.C.R. 154. The defendant was convicted, and on appeal the conviction was affirmed, of unlawfully taking a girl under 16 years from her father. It was proved he did take her and that she was under 16; but that he bona fide believed, and had reasonable ground for believing that she was over 16. That case might fairly be distinguished from the present case inasmuch as there the defendant's act was wrong per se; it was not only unlawful, it was immoral.

A case very much in point is *Cundy v. Le Cocq*, 1884, 13 Q.B.D. 207. Mr. Justice Stephen in the judgment of the Court said, "Our answer to the question put to us turns

upon this : whether the words of the section under which the conviction took place, taken in connection with the general scheme of the Act, should be read as constituting an offence only when the licensed person knows, or has means of knowing, that the person served with intoxicating liquor is drunk ; or whether the offence is complete when no such knowledge is shown." I am of opinion " that the words of the section amount to an absolute prohibition of the sale of liquor to a drunken person and that the existence of a bona fide mistake as to the condition of the person served is not an answer to the charge, but is a matter only for mitigation of the penalties that may be imposed. I am led to that conclusion both by the general scope of the Act, which is for the repression of drunkenness, and from a comparison of the various sections under the head "offences against public order." It is impossible now, as illustrated by the cases of *Reg. v. Prince* and *Reg. v. Bishop* to apply the maxim 'mens rea' generally to all statutes, and the substance of all the reported cases is that it is necessary to look at the object of each Act that is under consideration to see whether and how far knowledge is of the essence of the offence created. Here as I have already pointed out, the object of this part of the Act is to prevent the sale of intoxicating liquor to drunken persons and it is perfectly natural to carry that out by throwing on the publican the responsibility of determining whether the person supplied comes within that category."

Having in view the history of the legislation ; the group of sections referring to the subject matter and the scope of the entire enactment, and being guided by recent decisions and adopting the principles laid down in *Cundy v. Le Cocq*, 1884, 13 Q.B.D. 207, I think the defendant is liable, but following the course pursued in such cases, I shall not name the full penalty \$50, but shall impose a minimum sum. I therefore adjudge the defendant guilty of the offence charged and fine him \$10, and do order that in default of payment, he be imprisoned in the common jail of the city and county of Saint John for 30 days.

## [SUPREME COURT OF NOVA SCOTIA.]

BEFORE TOWNSHEND, J., IN CHAMBERS.

## THE QUEEN v. BURKE.

*County Judge's Criminal Court (N.S.)—Powers as of a  
Superior Court—No Review on Habeas Corpus—  
Irregularity in Warrant of Commitment.*

1. The County Judge's Criminal Court is not an inferior Court subject to review upon habeas corpus of its decisions and proceedings.
2. The judge of the County Judge's Criminal Court is invested as to proceedings within the jurisdiction of that Court with the like powers as belong to a Superior Court judge.
3. Where sentence has been passed by a Court having general jurisdiction of the case such as the County Judge's Criminal Court has in cases of theft, and the prisoner is detained in custody thereunder, the authority of the Court to pass the sentence need not be set out by the jailer upon the return to a writ of habeas corpus.
4. If the return is of a warrant of commitment for theft which however does not specify such facts as would show on its face that the theft was of such a nature as to give jurisdiction to the County Judge's Criminal Court to impose the imprisonment stated, still the prisoner cannot be discharged upon habeas corpus.

ARGUED : March 15, 1898.

DECIDED : March 22, 1898.

The defendant, Michael Burke, a prisoner in the County jail at Halifax, undergoing a sentence of six months' imprisonment imposed on him by the judge of the County Judge's Criminal Court for the County of Halifax, on February 21st, on a conviction had before him under Part LIV. of the Criminal Code 1892 for larceny, applied to Townshend, J., at Chambers on the 4th of March last for an order in the nature of a writ of *habeas corpus* under chapter 117, Revised Statutes of Nova Scotia (fifth series) "Of securing the liberty of the subject," to test the validity of the warrant under which he was held. The learned judge made the order asked for and directed service of it and of the notice of motion for the prisoner's discharge on the Attorney-General of Canada, along with the other officers entitled to notice of the proceedings. The keeper of the common jail at Halifax, to whom the order was directed, made a return to it as follows :—

"Halifax, s. s. By virtue of the within order I, William L. Malcolm, keeper of the common jail at Halifax, do hereby return to the Honorable Mr. Justice Townshend that Michael Burke is a prisoner in the common jail at Halifax under and by virtue of a warrant of commitment, whereof a true and certified copy of the said warrant is annexed to this order, and that the said Michael Burke was committed to said common jail, under and by virtue of said warrant, on the 21st day of February, A.D. 1898, and the said Michael Burke is now detained in said common jail solely by virtue of said warrant, and for no other reason or cause whatsoever.

"Dated at Halifax this 4th day of March A.D. 1898.

(Signed) "WM. L. MALCOLM, (Seal.)

"Keeper of the Common Jail at Halifax."

A copy of the certified warrant verified by affidavit and referred to in the return was annexed to the order. It was as follows :—

"County Court Judge's Criminal Court,

"Province of Nova Scotia, County of Halifax, Dis. No. 1,

"February Sittings, 1898. The Queen and Michael Burke.

"The 21st day of February, 1898.

"Present—The Honorable James W. Johnston, Judge County Court Judge's Criminal Court, County of Halifax, Dis. No. 1.

"SUR. INDICTMENT FOR FELONY OR MISDEMEANOR.

"Crime :—Larceny.

"The prisoner being placed in the dock on motion of F. T. Congdon, prosecuting officer, for judgment of the Court against the prisoner, the Court delivered judgment and sentence as follows :—That the said Michael Burke be confined in the County Jail at Halifax, in the County of Halifax, according to the rules and regulations of that institution for the period of six (6) months.

"I, Simon H. Holmes, clerk of said Court, do hereby

certify that the above is a true copy of the sentence and judgment in this case, taken from the minutes and records of said Court.

"Now therefore these are to require and command you to receive the said Michael Burke into your custody and him to detain in the said jail for the period of six months in conformity with the terms of said sentence, and for which this shall be your sufficient warrant.

"Dated at Halifax this 21st day of February, A.D. 1898.

"(Seal of Court.)

"S. H. HOLMES."

<p>"To the Keeper of the County Jail at Halifax, in the County of Halifax.</p>	}	<p>Clerk of the Crown and Clerk of the County Court Judge's Criminal Court, County of Halifax, District No. 1."</p>
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On this return being filed the prisoner's Counsel gave a Notice of Motion for the defendant's discharge before the learned Judge who made the Order and served the persons directed to be so served. The motion was now heard on March 15th, 1898.

*J. J. Power* for the prisoner. The only ground before the Court as authority for the prisoner's detainer is the warrant returned by the jailer. The warrant is bad. *Ex parte Stather*, 25 N.B.R., 374, 378. The offence stated in it is uncertain. It states simply the crime of larceny and states the imprisonment is to be for six months. There are various kinds of larceny that are punishable with various degrees of imprisonment varying from life to three months, Cr. Code, secs. 323, 337, 339, 341, 342, &c. *Non constat* but that the conviction may be for one of these punishable with less than six months' imprisonment in which case the warrant would be bad.

[TOWNSHEND, J.—The warrant is very loosely drawn up.]

A commitment in execution is construed more strictly than one merely for safe custody. *R. v. Gourlay*, 7 B. & C. 672. Burn's Justice, Vol. 1, page 871. If a commitment in



execution be bad in part it is bad for the whole. *Goff's case*, 3 M. & S. 203. In *Dr. Groenveld's case*, 1 Ld. Rayd, 213, it was resolved "that the cause of commitment ought to be certain, to the end that the party may know for what he suffers, and how he may regain his liberty." A commitment merely for "felony" is bad. It must state the special nature of the felony briefly as "felony for the death of J.S."; and the reason is because it may appear to the Judges of the Queen's Bench upon habeas corpus whether it be felony or not. 2 Hale 122. See Forms "MM" and "NN" Criminal Code.

The County Court Judges' Criminal Court is a special inferior court of limited statutory jurisdiction; and that being so all its proceedings must show jurisdiction on their face. That doctrine even holds good in the case of an order made even by the Lord Chancellor acting under special statutory authority. *Christie v. Unwin*, 11 A. & E. 378, 379. The Speedy Trials' Court was erected here by chapter 11 of the Acts of the Legislature of Nova Scotia for 1889.

Certiorari would lie to that Court from this one. *R. v. Foster*, 33 Can. Law Journal, 499. As to the meaning of a "Court of Record," see *Tupper v. Murphy* 3 R. & G. (Nova Scotia) 188; *Armstrong v. McCaffrey*, 1 Hannay, (N.B.) 518. As to the difference between a Court of superior and of limited statutory jurisdiction, see *Levy v. Moylan*, 10 C.B. 189, 204, 209. *Gosset v. Howard*, 10 Q.B. 359, 452.

*F. T. Congdon*, contra, for the Attorney-General of Nova Scotia. *Ex parte Stather*, 25 N.B.R. 374, is bad law and cannot be supported by precedent or authority. See the judgment of King, J., page 386. Even if it could be so supported it does not apply here. There is no need of a warrant to hold this prisoner. The verbal sentence of the judge is sufficient. See Penitentiary Act, R.S.C. 1886 c. 182, section 42. When once the County Court Judge's Criminal Court is seised of jurisdiction over a prisoner on trial for a crime it has the same authority as this Court. At all events its sentence or proceedings cannot be reviewed on habeas corpus.

*R. v. St. Denis*, 8 Ont. Pr. 16; *R. v. Goodman*, 2 Ont. Rep. 468. See also *Sproule's Case*, 12 Can. S.C.R. 140 and *Re D. C. Ferguson*, 24 N.S.R. 106. If the motion is enlarged we can get the conviction here.

*J. J. Power* in reply. The Ontario cases do not apply here. There the statute prohibits a habeas corpus going to a Court like the County Criminal Court. *Sproule's case*, and *Ferguson's case* also do not apply because the Speedy Trials Court is not a superior Court of criminal jurisdiction. *Peacock v. Bell*, Saunders, Rep. 73 (n). This motion ought not to be enlarged. *Re Timson*, L.R., 5 Ex. 257.

HALIFAX, March 22, 1898.

TOWNSHEND, J.—

This is an application for a writ of habeas corpus for the discharge of the defendant confined in the jail at Halifax. It appears from the return of the jailer and the warrant annexed that the defendant was tried and convicted of the crime of larceny in the County Court Judge's Criminal Court District No. 1, and on such conviction was by the Judge sentenced to be confined in the County Jail at Halifax for the period of six months. This conviction and sentence were made on the 21st February, 1898, and he is now in jail undergoing that sentence.

It is now contended on his behalf that the warrant under which he is so confined does not disclose a legal cause for his detention; in this respect, that it does not state in the warrant the nature of the larceny or theft, or any facts from which it can be ascertained on the face of the warrant that the sentence was one which the judge could undoubtedly inflict. It is pointed out that there are various descriptions of larcenies, over some of which the judge has not jurisdiction and also that some of these can only be punished by three months' imprisonment. That therefore it does not appear on the face of the warrant, as it should, that the sentence was conformable to law. It is further contended that it does not appear that the crime was committed in the County of

Halifax, nor that the judge tried the defendant in the County, both of which it is said are necessary to his jurisdiction.

Now it seems to me that the learned counsel for the prisoner could never have carefully read the well known case *In re Robert Evan Sproule* 12 Can. S.C.R. 140, when he advised an application of this kind on the grounds taken. If he had studied the decisions of the learned judges he must have at once seen that there was not the slightest chance of success, for in the words of Gray, J., in *Fleming v. Clarke*, 12 Allen (N.B.) 191, there cited he would have known "the general rule is well established that a person imprisoned under the sentence of a court having general jurisdiction of the case, is not to be discharged by habeas corpus, but should be left to his remedy by appeal, exceptions or writ of error."

Lord Denman, C.J. also, in *Brenan's case*, 10 Q.B. 502, says, "We think, however, the Court having competent jurisdiction to try and punish the offence, and the sentence being unreversed, we cannot assume that it is invalid or not warranted by law, or requires the authority of the Court to pass the sentence to be set out by the jailer upon the return. We are bound to assume *prima facie* that the unreversed sentence of a Court of competent jurisdiction is correct, otherwise we should in effect be constituting ourselves a Court of appeal without power to reverse the judgment." On which Sir Wm. Ritchie, C.J., says, "No words could have more clearly intimated that the fact of a sentence having been passed by such Court founds the right to detain or that the validity or regularity of the sentence is not to be called in question; even if the sentence is erroneous, the Court cannot set it aside, or enquire into its propriety or deny the effect which the law assigns to any sentence."

Again in our own Court in *re D. C. Ferguson*, 24 N. S. R. 106, the same question is decided and the Court pointed out that where the sentence was wrong the matter could not be inquired into on habeas corpus.

I think it unnecessary to give any further authority, and if

more is needed the references will be found in the two cases above cited.

The only question which raises a doubt in my mind was whether the County Court Judge's Criminal Court stood in this respect in exactly the same position as the Supreme Court. It was argued that it was an inferior Court and therefore its sentence could be enquired into on a writ of habeas corpus. The County Court Judge's Criminal Court is constituted by 52 Vic. (Can.) c. 47 known as the Speedy Trials Act and by Acts N. S. 1889, chap. 11, and a person committed for trial on certain charges may, with his own consent, be tried there before the judge without a jury. By sec. 4 of chap. 47, above referred to, "the judge sitting on any trial under this Act for all the purposes thereof, and proceedings connected therewith, or relating thereto shall be a court of record." He is therefore fully invested in relation to the criminal jurisdiction he so exercises with all the powers and jurisdiction which belong to a judge of the Supreme Court, and further his decision or sentence can only be reviewed by judges of the Supreme Court in the way fixed by the Criminal Code.

No judge of this Court, not even the full Court, can, in my opinion, review his action in any other way, and certainly not by means of a writ of habeas corpus. I conclude with the words of Strong, J., in *re Sproule*, 12 Can. S. C. R. 140, where he says on page 204, "If any proposition is conclusively established by authorities having the support of the soundest reasons, it is, that after a conviction for felony by a Court having general jurisdiction of the offence charged, a habeas corpus is an inappropriate remedy; the proper course to be adopted in such a case being that to which the prisoner in the present case first had recourse, viz., a writ of error."

This application is therefore refused.

**Note:** *County Judge's Criminal Court—Constitution of, in Nova Scotia—Superior or Inferior Court—Habeas Corpus where jurisdiction questioned.*

The County Judge's Criminal Courts in Nova Scotia were established by a statute (N.S.) 1889, c. 11, which enacts:

(Sec. 1.) The judge of every County Court is constituted a court of record for the trial of any persons committed to jail on a charge of having been guilty of *any* offence, and for which the person so committed consents to be tried without a jury; and the court so constituted shall have the powers and duties which the Speedy Trials Act and any amendment thereto purports to give, so far as the Legislature of this province can give the same.

By the Criminal Code, sec. 765, taken from the Speedy Trials Act (Can.), 1889, c. 47, s. 5, "every person committed to a gaol for trial on a charge of being guilty of any of the offences which are mentioned in section 539 as being within the jurisdiction of the General or Quarter Sessions of the Peace," may with his own consent (of which consent an entry shall then be made of record), and subject to the provisions of the Code, be tried thereunder at the County Court Judge's Criminal Court.

That such court was not a *superior* court of criminal jurisdiction would appear from the proviso contained in section 5 of the Speedy Trials Act (Can.) as follows: "provided always that no person accused of an offence the power to try which is by sections 4, 5 and 6 of the Criminal Procedure Act (R.S.C. 1886, c. 174), conferred solely upon a *superior court* having criminal jurisdiction, shall be tried under this Act."

In *Re D. C. Ferguson*, 1892, 24 N.S.R. 106, the accused had been tried and convicted at the criminal sittings of the Supreme Court of Nova Scotia at Halifax before the chief justice of the court, and the full court there held that the conviction, being before a court of superior jurisdiction, its decision on its own jurisdiction is *res judicata* unless reversed

**Note :** (*Continued.*)

on a writ of error or by the court for crown cases reserved, if any exists (24 N.S.R. at p. 110).

In *R. v. Crabbe*, 1854, 11 U.C.R. 447, the Court of Queen's Bench, Ontario, refused a writ of habeas corpus to bring up a prisoner convicted at the Quarter Sessions of larceny, one of the grounds taken being that the chairman of the Sessions was not present at the trial and his absence was not shewn to be unavoidable.

The statute 8 Vict. (Can.) 1845, c. 13, s. 3, required that the chairman of the Sessions should be a barrister of five years' standing, and directed that he should preside, "unless in cases of absence from sickness or other unavoidable cause, when the justices present shall elect another chairman *pro tempore*." This was held to be a mere direction that the judge is to preside when he can, Robinson, C.J., saying that the regularity of the constitution of a court can never depend upon a question to be tried on affidavit whether an absence was unavoidable or not.

If, however, a court having no jurisdiction over the offence charged should so far exceed its authority as to entertain a criminal prosecution, there the proceeding being one beyond its general jurisdiction is wholly void, and the prisoner so illegally dealt with may be entitled to be discharged on a writ of habeas corpus. (Per Strong, J., in *Re Sproule*, 1886, 12 Can. S.C.R. at p. 205); *ex. gr.* if a Court of General Sessions, having no jurisdiction either at common law or by statute to try a prisoner for murder, should try and sentence on such a charge, the proceeding would be beyond the "general jurisdiction" of the court. (*Ibid.*)

When there has been a conviction for a criminal offence by a *superior court* of record having general jurisdiction over the offence, the objection that the court ought not, in that particular case, to have exercised its jurisdiction, or that there was some fatal defect in its proceedings, is one conclusively for a court of error; in other words, the judgment

**Note :** (*Continued.*)

of the court is *res judicata* as to questions of jurisdiction as well as to all other objections. (Ibid.)

Sproule had been convicted of murder at a court of oyer and terminer and general gaol delivery, after a change of venue from the District of Kootenay, B.C., to the District of Victoria, in the same province. It was argued for the prisoner that the order for change of venue was invalid, and that the court was not properly constituted without a commission from the Governor-General, and also that the indictment failed to shew jurisdiction, the only venue therein being "British Columbia, to wit," notwithstanding the fact that that province was divided into judicial districts. All of these grounds had been previously disallowed upon a return to a writ of error granted by the Supreme Court of British Columbia, which is a "superior criminal court of the highest character, clothed with all the powers and jurisdiction, civil and criminal, necessary or essential to the full and perfect administration of justice, civil or criminal, without limitation or stint, powers as full and ample as those known to the common law, and possessed by the superior courts of England, and to which court as a *necessary and essential part of the jurisdiction* belongs the right to supervise inferior courts, and entertain writs of error from the Courts of Oyer and Terminer and General Gaol Delivery when duly allowed by Her Majesty's Attorney-General." A writ of habeas corpus, granted by Henry, J., of the Supreme Court of Canada was under these circumstances quashed by the full court. *Re Sproule*, 1886, 12 Can. S.C.R. 140.

In the judgment of Townshend, J., in *The Queen v. Burke*, reported *supra*, that learned judge ascribes to Sir William Ritchie, a former Chief Justice of the Supreme Court of Canada, the following language taken from the report in 12 Can. S.C.R. at page 197 as having been spoken by way of comment upon that part of the judgment of Lord Denman in *Brenan's case* quoted by Townshend, J., in his judgment :

**Note : (Continued.)**

"No words could have more clearly intimated that the fact of a sentence having been passed by such court founds the right to detain, or that the validity or regularity of the sentence is not to be called in question ; even if the sentence is erroneous the court cannot set it aside, or enquire into its propriety, or deny the effect which the law assigns to any sentence."

But an examination of the report of *Brenan's case*, 1847, 10 Q.B. at page 503, shows that these words are a part of Lord Denman's judgment there, and should have appeared as a quotation therefrom in the report of *Re Sproule*. The same error has been repeated in the quotation from the latter case made in *Re D. C. Ferguson*, 1892, 24 N.S.R. at p. 109.

The words quoted were used by Lord Denman with reference to an Imperial Statute as to the carrying out of sentences of transportation beyond seas, (5 Geo. IV. c. 84, s. 17) which enacted that "whenever any convict *adjudged* to transportation by any court or judge in any part of His Majesty's dominions not within the United Kingdom, shall be brought to England in order to be transported, it shall and may be lawful to imprison any such offender in any place of confinement provided under the authority of this Act."

Brenan and another had been convicted in the Royal Court of Jersey and sentenced to transportation for stealing, and the prisoners were removed to England under the direction of a Secretary of State for the purpose of carrying out the sentence of transportation, and placed in an English prison. It was argued that the detention was not in any of the particular prisons appointed under the Act 5 Geo. IV. c. 84, but the court considered the part of the statute authorizing such a selection or appointment as directory and as not interfering with the power asserted in general terms by section 17 above quoted.

Lord Denman there said "The non-observance of these particulars may expose officers to censure, but it does not require the discharge of the criminal convicted by a competent



**Note :** (*Continued.*)

court within Her Majesty's dominions of a crime well known to our laws, condemned to a punishment equally known to them, and brought into this country under a sentence of a court within that part of Her Majesty's dominions where the crime was committed." (10 Q.B. at p.503). There had in that case been no objection taken to the jailer's return on the ground that it did not shew jurisdiction in the court to try and punish for the particular crime, but it was argued that it was bad for not shewing that the court had power to punish by transportation. (p. 502).

Chief Justice Ritchie in *Re Sproule* considered that the difficulty in the case had arisen from "a misapprehension of what can and what cannot be done under a writ of habeas corpus," but more especially from not duly appreciating the distinction between the validity and force of records of courts of *inferior* and of courts of *superior* jurisdiction, but treating records of superior and inferior courts as being of the same force and effect; and he there expressly dissents from the proposition that if the record of an inferior court can be shewn to be erroneous or false as touching the matter of jurisdiction the record of a superior court can be treated likewise. (p. 194).

The County Judge's Criminal Court, as well in Nova Scotia as in Ontario, New Brunswick, Prince Edward Island, British Columbia and Manitoba, is a court of inferior jurisdiction. It would therefore seem that if want of jurisdiction as to the offence charged be shewn, which was not done in *Burke's* case, that habeas corpus will lie to enquire into the fact of jurisdiction, unless the right thereto has been taken away by a statute in force in the particular province. See *R. v. Murray* ante p. 452, and Note p. 455.

## [COURT OF QUEEN'S BENCH, QUEBEC.]

BEFORE WURTELE, J.

## THE QUEEN v. GILLESPIE.

*Trading company—False statement of affairs by director—  
Locality of crime—Place of mailing or place of receipt of  
letter—Continuing offence—Concurrent jurisdiction in  
two provinces—Company law of another province—  
Canada Evidence Act sec. 7—Judicial notice of  
status of president as director—Habeas corpus  
after committal for trial—Duty of judge  
upon—Cr. Code 365, 553 (b), 554 (b).*

1. A charge against the president of an incorporated trading company of having made and published a statement of its affairs knowing the same to be false and with intent to defraud, may be tried either in the province in which the statement was despatched by mail to the party defrauded, or in the province in which it is received by mail at the address to which the defendant directed it.
2. The offence is in such case commenced in the province where the letter containing the statement was mailed, and is continued and completed in the province to which it is sent, and under Cr. Code sec. 553 (b) is to be considered as completed in either jurisdiction.
3. A magistrate of the district to which the letter is addressed, and in which it is received by the defrauded party, may take the information in such a case under Cr. Code sec. 554 (b), and compel the attendance of the accused by a warrant executed in the province from which the letter was despatched.
4. In considering a charge against the "president" of an incorporated company for publishing a false statement under Cr. Code sec. 365, which in terms applies to directors or managers of companies, judicial notice will be taken of the statutes of another province under which the company was incorporated, requiring the president to be chosen from the directors; and a warrant of commitment against the president, as such, after proof of the manner of incorporation, need not allege that he was a director.
5. The duty of judge under a writ of habeas corpus is to examine whether the committing magistrate has jurisdiction, whether the committal is legal, and whether any crime known to the law is alleged to have been committed, but not to enquire into or revise the magistrate's decision as regards its propriety or impropriety on the merits.

DECIDED : August 10, 1898, and September 25, 1898.

The defendant, William E. Gillespie, was arrested in the month of July, 1898, at his domicile in the village of Penetanguishene, in the County of Simcoe, Province of Ontario,

on a warrant issued by the Police Magistrate of the City and District of Montreal. The warrant issued on an information laid on behalf of the Hon. A. A. Thibaudeau, of Montreal, a partner in the firm of Thibaudeau Bros. & Co., who have their office and place of business in the said City of Montreal. The information was laid under Article 365 of the Criminal Code, and was to the following effect :

"That at the City of Montreal, on the 10th day of July, 1897, and the 14th day of April, 1898, the defendant, W. E. Gillespie, being then and at all the said periods a director, president and manager of The W. E. Gillespie Company, Limited, a body politic and corporate, duly incorporated by law, made, circulated and published, and caused to be made, published and forwarded to the firm of Thibaudeau Bros. & Co., in the City and District of Montreal, an account of the financial position and standing of the said The W. E. Gillespie Co., Limited, which he knew to be false in every material particular, with intent to defraud and deceive the creditors of the said The W. E. Gillespie Co., Limited, and more particularly the said firm of Thibaudeau Bros. & Co., who were then and at all of said periods creditors of the said The W. E. Gillespie Co., Limited, in and for a sum of money exceeding \$7,000, and with intent to induce the said firm of Thibaudeau Bros. & Co. to intrust and advance goods, wares and merchandise to the said The W. E. Gillespie Co., Limited."

On this warrant the defendant was arrested at his domicile in Penetanguishene and brought to the City of Montreal for trial.

Another information was laid on 26th July, 1898, in respect of a similar alleged offence of the 12th June, 1898.

The preliminary investigation was opened on the 27th July, 1898, before Magistrate Lafontaine, Judge of the Sessions of the Peace for the City of Montreal, and by order of the Magistrate the investigation proceeded on the three charges at one and the same time.

The prosecution based their case on the letters, Exhibits 1 and 2, which were as follows :

(Exhibit 1.)

PENETANG, 10th July, '97.

MR. A. A. THIBAudeau.

DEAR SIR :

We are in receipt of yours of the 7th, and beg to enclose you summary of our last stocktaking. It does not show up as well as we would have liked it to appear, as, when our company was organized in October, '95, our surplus was then \$9,000, and the increase for sixteen months is not so much as we should have made it. However, there was a total failure of the crops here in '95, and the farmers got so far behind that year with the loan companies that it took all their '96 crops to overtake it ; consequently, for the past two years business has suffered. The prospects for this fall are good ; the crops in this section never looked better, and there are two less general stores in Penetang than there was one year ago. This will enable us to get our account in better shape with you ; and as we intend remitting you weekly all we can, we will soon be able to overtake what we are behind with you. We are sorry we have not been able to do better lately, but trade has been very poor, owing to tariff matters. The saw mills here are only starting up next week, three months later than usual. We thank you very much for your leniency, and enclose you cheque for \$100, to apply on our account, and will do the best we can hereafter.

Yours truly,

(Signed) W. E. GILLESPIE CO.

STOCK-TAKING, JANUARY 29TH, 1897.

*Hillsdale Stock.*

Dry goods.....	\$3,198 47
Clothing .....	1,385 03
Boots and shoes.....	768 12
Groceries, etc.....	415 52
Wallpaper, crockery, etc.....	187 31
Fixtures .....	47 75
Book accounts.....	184 98
	<hr/> \$6,187 18

*Penetang Stock.*

Dry goods.....	\$4,195 27	
Fancy goods .....	365 08	
Hats, caps, etc. ....	162 15	
Crockery.....	361 14	
Boots and shoes .....	1,310 45	
Groceries .....	1,015 10	
Ready-made clothing....	1,965 15	
Millinery and mantles.....	642 11	
Furniture, safe, horses.....	875 25	
New goods received and not opened during stock-taking .....	657 10	
Book accounts.....	3,962 10	
Cash on hand....	52 25	
	<hr/>	15,563 15
		\$21,750 33
Total liabilities to date .....		11,624 55
		<hr/>
Surplus .....		\$10,125 78

*(Exhibit 2.)*

PENETANGUISHENE, April 14th, '98.

MESSRS. THIBAudeau BROS. &amp; CO.

DEAR SIRs :

Replying to yours of 11th inst., we beg to say our last stock-taking showed liabilities \$12,624.55, with assets of \$22,750.33 ; but unfortunately, owing to a crop failure for two years collections from that source has been very slow. There was fair crops around here last year, but the farmers were so far behind with the loan companies, that we were not able to collect much from them. A large part of the trade around here consists of lumbering which comes down from the North Shore, and that business has not been so poor in years around here as it has been the past twelve months. With the change in Lumber laws, all the mills around here are going to run early this spring, and prospects are now better than they have been for some years. This is a summer town, and navigation will be open in a few days, and with all the mills running we will be able to make you some good payments this summer, and we hope to overtake what we are behind with you, owing to the dull times there has scarcely been anything selling

here but groceries and necessaries. These we have had to keep well assorted, or we might as well shut up shop. We are sorry we have been so slow in our payments to you, but with good prospects ahead, we will do our utmost to reduce our account this summer, and will send you cheque on account in a few days. Thanking you very much for the accommodation you have given us, and hoping this will be satisfactory we remain,

Yours truly,  
(Signed) W. E. GILLESPIE & Co.

These letters were proved to have been sent by the defendant to the complainant at his address in the City of Montreal, and they were received by him there. The complainant believed the statements contained in these letters to be true, and although but a small amount of goods was advanced after receiving these letters, the complainant testified that on the strength of these statements he had extended the defendant's credit, and renewed a large amount of his notes which were maturing about that time.

Proof was made of the incorporation of The W. E. Gillespie Co., Limited, by the production of the letters patent of incorporation, and also of the fact that the defendant W. E. Gillespie was the president and manager of the said company.

The statement of 12th June, 1898, was a more complicated one, and was received by the complainant in the following way: In the month of June, 1898, the complainant, being dissatisfied with the payments made by the defendant, instructed his solicitors in Toronto, Messrs. Clute, Macdonald, Macintosh & McCrimmon, to investigate the defendant's affairs and to obtain from him a statement of his financial standing and position.

On the 12th June, 1898, the defendant was interviewed by Mr. John G. Hay, one of the members of the said firm of Messrs. Clute & Co., and to Mr. Hay he gave a written statement in the village of Penetanguishene, showing that he had a surplus of some \$5,000 in his business. Mr. Hay

explained to the defendant that the statement was to be forwarded to Mr. Thibaudeau in Montreal, and it was proved that the defendant, when he gave the statement, knew that it was to be forwarded to Montreal. As a matter of fact, this statement when completed was copied by Mr. Hay, and this copy was sent to Mr. Thibaudeau addressed to him in Montreal, from the office of Messrs. Clute & Co.

Proof of the falsity of these various statements was made in the following way :

It was proved that while at the date of the three statements above referred to the defendant represented that he had a certain amount of book debts payable to the firm, these book debts had been previously assigned in the month of November, 1896, to the firm of S. F. McKinnon & Co. of Toronto, and that this assignment of book debts covered both present and future book debts until the amount of S. F. McKinnon & Co.'s liability had been fully liquidated. It was proved that the Hillsdale stock, included as an asset in the letter of 10th July, 1897, had been previously disposed of by the defendant in May, 1897, and that, as a consequence, when the letter of 10th July was forwarded to Messrs. Thibaudeau Bros. & Co., this stock formed no portion of the assets of The W. E. Gillespie Co.

Proof was also made of the stock-taking by the defendant on the 21st day of February, 1898, which showed that the assets of the firm on that date only amounted to about \$2,400.00, whereas the letter of the 14th April, 1898, represented the stock of the company "at their last stock-taking" to be \$22,750.33.

Proof was also made by one James G. Strong, an accountant, of Toronto, that he had taken the stock of The W. E. Gillespie Co. by order of the creditors on the 9th day of July, 1898, and that the total amount of stock on that date was \$3,097.22. On the 18th day of July, 1898, The W. E. Gillespie Co., Limited, made an assignment for the benefit of their creditors, and the official stock-taking on that date showed the amount of their movable assets to be

\$2,674.95, with book-debts of about \$2,000, which were claimed by S. F. McKinnon & Co. under the deed of assignment above referred to. The liabilities of the Company on that date were about \$17,500.00.

No evidence was adduced by the defence at the preliminary investigation, but it was submitted on behalf of the defendant that the Court at Montreal had no jurisdiction to consider the matter. They also attacked the manner in which the preliminary investigation had been conducted and more particularly the joinder of the three offences which were charged in the informations for the purpose of one preliminary investigation.

These objections were overruled by the Magistrate on the ground that he had the right by law to regulate the method of inquiry, and he also considered that the court in the District of Montreal had full jurisdiction to try the accused, as he considered that the offence had been begun in the County of Simcoe but continued and completed in the District of Montreal.

The defendant was then committed for trial, and the defence made this application for a writ of habeas corpus and certiorari.

*W. F. Ritchie* and *D. O'Connell* (of the Ontario Bar) for the prisoner.

*Odilon Desmarais* for the Crown.

*Gordon W. MacDougall* for the private prosecutor.

MONTREAL, August 10, 1898.

WURTELE, J.—

The petitioner was committed on the fifth day of August instant for trial on the charge of having made and published as the president and manager of "The W. E. Gillespie Co., Limited," on the 10th July, 1897, the 14th April, 1898, and 12th June, 1898, at the City of Montreal, statements of its affairs which he knew to be false, with intent to deceive and defraud the firm of Thibaudeau Bros. & Co., and to induce it to entrust and advance goods, wares and merchandise to such company.



The company had its place of business at Penetanguishene, and was incorporated by letters patent granted under the laws of Ontario, and it had had dealings since 1895 with the firm of Thibaudeau Bros. & Co. The petitioner was one of the directors and the president of the company, and he was also the manager. On the 10th day of July, 1897, he transmitted to the firm of Thibaudeau Bros. & Co. a statement of the affairs of the company, showing a surplus of \$10,125.78. This statement was made at Penetanguishene, and was received through the mail by the firm of Thibaudeau Bros. & Co. at Montreal. Then on the 14th day of April he wrote a letter to the firm, which was also received by it in Montreal, and which stated the assets of the company to be \$21,750.33, and its liabilities \$12,624.55, thus showing a surplus of \$10,125.78. Afterwards, on the 12th June, 1898, at the request of Mr. Hay, who represented the firm of Thibaudeau Bros. & Co., the petitioner prepared another statement of the affairs of the company, which he dated as of the 11th of June, 1898, showing the assets to be \$21,500, and the liabilities \$15,877.40, and giving a surplus of \$5,622.60; but this statement was not sent by the petitioner to the firm in Montreal, but was delivered by him to Mr. Hay at Penetanguishene, and was later on transmitted to the firm of Thibaudeau Bros. & Co. from Toronto by the legal firm of which Mr. Hay was one of the partners. These statements are shown to have been false, and as a matter of fact the company had a deficit instead of a surplus.

The committing Magistrate thought that the evidence was sufficient to put the petitioner on his trial, and he therefore committed him for trial before the Court of Queen's Bench, in Montreal, at its next term.

The petitioner contends that the committal is illegal, and he has been brought before me on a writ of habeas corpus. The return shows that the petitioner is detained under a warrant of commitment to stand his trial for having committed an indictable offence under Article 365 of the Criminal

Code, on the charge of having made and published false statements of the affairs of "The W. E. Gillespie Co., Limited," acting as its president and manager, which he knew to be false, with intent to deceive and defraud the firm of Thibaudeau Bros. & Co., and to induce it to advance goods, wares and merchandise to the company.

The petitioner contends that the committal is illegal :

1. Because it is not shown in the informations which were laid against the petitioner where the offences with which the petitioner was charged were committed :

2. Because according to the evidence there is no proof that any criminal offences were committed :

3. Because, if any offences were committed, they were so committed outside of the jurisdiction of the committing magistrate, Mr. Lafontaine, a Justice of the Peace for the District of Montreal :

4. Because the committing magistrate had no jurisdiction in the matter.

These reasons are given in the petition for the writ of habeas corpus ; but, in addition to them, it was contended at the argument that the petitioner did not fall under the purview of Article 365 of the Criminal Code, inasmuch as he is alleged to have acted as the president of the company, while the article of the Code does not make it an indictable offence for the president, but only for a director of a company, to make and publish a statement, which may be false, of its affairs.

I will take up the objections in the order in which they were made. The first is, that the informations do not show where the offences with which the petitioner is charged were committed. A glance, however, at the two informations which were laid shows that the petitioner is under a misapprehension in making this statement. The first information, which was laid on the 21st July last, charges the petitioner with having made a false statement of the affairs of "The W. E. Gillespie Co., Limited," on the 10th day of July, 1897, and another on the 14th April, 1898, and with

having circulated and published by forwarding them to the firm of Thibaudeau Bros. & Co. in the City of Montreal, and the letters which contained these statements are addressed—the first to Mr. A. A. Thibaudeau, and the other to Messrs. Thibaudeau Bros. & Co., and it was proved that they were received by the firm in Montreal. The other information which was laid on the 26th July last avers that another statement was made and forwarded to the firm in the City of Montreal; but with respect to this last statement I must say that it was published by the petitioner only in the Province of Ontario by being delivered at Penetanguishene to Mr. Hay, the agent of the firm.

The first information, which was laid by N. Robert, the bookkeeper of the firm of Thibaudeau Bros. & Co., states positively that the first two statements were received by the firm in Montreal. When examined as a witness at the preliminary inquiry he persisted in his statement and confirmed it, and this evidence therefore established for the purpose of the preliminary inquiry the fact that these statements were published by delivery in Montreal to the firm. It is contended that the offence was committed in the Province of Ontario, and that the examining magistrates, and the courts of the Province of Quebec, had therefore no jurisdiction in the matter. As a matter of fact with respect to the first two statements the offence was commenced in the Province of Ontario, but it was continued and completed in the District of Montreal within the Province of Quebec. In such cases the jurisdiction of justices of the peace is regulated by paragraph (b) of art. 553 of the Criminal Code, which provides that where an offence has begun within one magisterial jurisdiction and is completed within another the offence is considered to have been committed in either of such jurisdictions. Any magistrate for the District of Montreal had therefore the power and jurisdiction to receive an information with respect to the charge laid against the petitioner and to issue a warrant to compel the attendance of the petitioner before him for the purpose of the preliminary

inquiry under paragraph (b) of art. 554 which provides that a Magistrate has power and jurisdiction to act whenever any person is accused of having committed within the limits of his jurisdiction any indictable offence triable in the Province in which he resides.

A court of criminal jurisdiction in any of the provinces is competent to try all offences, wherever committed, if the accused is in custody within the jurisdiction of such court, or has been committed for trial to such court, with the exception, however, that no court in any province can try any person for an offence which has been committed entirely in another province. In the present case, the Court of Queen's Bench in the District of Montreal has jurisdiction to try the petitioner for the offence with which he has been charged, because he is in custody within its jurisdiction, and has been committed for trial before it, and because the offence with which the petitioner is charged is alleged to have commenced in the Province of Ontario, and to have been completed within the Province of Quebec. Under these circumstances, the courts of criminal jurisdiction of the Provinces of Ontario and Quebec have consequently concurrent jurisdiction in the present case.

With respect to the second objection it must not be forgotten that the proceeding under a writ of habeas corpus is not an appeal. The judge acting under a writ of habeas corpus examines whether the committing magistrate has jurisdiction, whether the committal is legal, and whether any crime known to the law is alleged to have been committed, but he is not called upon to determine whether the committing magistrate's decision is in accordance with the evidence or is proper or improper, on the merits of the case. The proceeding is not an appeal against the magistrate's decision, but is an investigation as to whether he has power or jurisdiction to act, whether the commitment is legal, and whether any offence known to the law is charged; and if the magistrate had the necessary power or jurisdiction its exercise will not be enquired into. The information set up a criminal offence, and the committing magistrate held that there was sufficient

proof to authorize the committal of the petitioner on the charge laid against him, and his decision cannot be enquired into or revised on a writ of habeas corpus. Then the warrant of commitment appears to be regular and legal.

I need not discuss the third and fourth objections, as I have fully answered them in my remarks on the first objection.

I now come to the last reason. The information laid against the petitioner on the 21st July, 1898, charges him with having made the false statements therein mentioned while he was a director and manager of the company, and the information laid on the 26th July last charges him with having made a false statement on the 11th June, 1898, while he was a director and the president and manager of the company. The warrant of commitment, however, states that he made, circulated and published the statements in question while he was the president and manager of the company, and does not allege that he was a director. Art. 365 of the Criminal Code makes it an offence for the manager of a company to make and publish a false statement, and therefore as the manager of the company he falls under the purview of the article in question. But besides this the fact of his being the president of the company would be sufficient of itself to bring him under the purview of the article.

By the statute of the Province of Ontario, regulating the management of joint stock companies, R. S. O., 1897, c. 191, s. 43 (4), it is provided that the directors shall elect one of themselves to be president of the company, and therefore the president must necessarily be a director. Section 7 of the Canada Evidence Act, 1893, provides that judicial notice must be taken of all Acts of the Legislature of any of the provinces of the Dominion, and I therefore have the proof that the petitioner while acting as president was really one of the directors of the company.

I find, therefore, that the petitioner was legally committed for trial in so far as the first two statements are concerned, and that he is now detained in the common jail

awaiting his trial on a regular and legal warrant of commitment. I therefore order that the petitioner be remanded, but I will allow him to give bail to appear on the first day of the next term of the Court of Queen's Bench to answer to the charge which has been laid against him. I will require two sureties in the sum of \$500 each, and his own recognizance for \$1,000. The writ of habeas corpus will therefore not be dismissed but will remain in abeyance to allow the petitioner to give such bail.

MONTREAL, Sept. 25, 1898.

After the failure of the habeas corpus proceedings the defendant gave bail and appeared for trial in the September term of the Court of Queen's Bench, Criminal side, and on the 25th September, 1898, he was found guilty by the jury of the offences charged and sentenced to six months' imprisonment in the common jail. Before this court also the question of jurisdiction was raised by the defence and decided in favor of the prosecution by his Honor Mr. Justice Ouimet.

On application by the defence for a reserved case, this application was refused by Judge Ouimet after consulting with his confrères of the Court of Queen's Bench.

**Note:** *Locality of crime—Extra-territorial act — Place of mailing letter.*

See Note p. 284-286.



# INDEX.

## Abatement

### *Death of informant—Appeal pending.*

1. An appeal under Cr. Code, 88o, to the General Sessions does not abate by the death of the informant. *R. v. FITZGERALD.* (ONT.) 420

### *Death of informant—Certiorari proceedings.*

2. Where an order *nisi* to quash a conviction has been issued, but before service of same upon the informant (prosecutor) the latter died, the proceedings do not lapse and can be properly continued by serving the magistrates. *IBID.* 420

## Abduction

1. "Against the will of" parent. 286
2. Evidence of persuasion. 284
3. Father's possession necessary at time of taking, prior abandonment by daughter. 263

### *Locality of crime—Foreign residence—Renunciation of parent's protection.*

4. When a girl who was resident with her father in a foreign country left without his consent and with intent to renounce his protection, and came to Canada, the father's possession ceased, and, *semble*, a possession *de jure* afterwards established by his following her to the place of flight is not the possession contemplated by Cr. Code, sec. 283. *R. v. BLYTHE.* (B.C.) 263

### *Possession de facto—Cr. Code 283.*

5. To constitute the crime of abducting a girl out of the possession of and against the will of her father under Cr. Code, sec. 283, there must be an actual or constructive possession, *de facto*, in the father at the time of the taking. *IBID.* 263

## Abortion

### *Manslaughter—Insufficient post-mortem examination.*

1. In a trial for murder by committing an abortion resulting in the girl's death, it appeared that the *post-mortem* examination was insufficient, and that, so far as the medical evidence was concerned, it was possible that death might have been occasioned by some undiscovered disease which a *post-mortem* examination of other organs than those examined might have disclosed, and none of the medical men would swear positively to the cause of death; but there was other evidence tending to show that death was caused by a criminal operation, and connecting the prisoners therewith. *Held*, that such last-mentioned evidence was properly submitted to the jury. *R. v. GARROW.* (B.C.) 246



**Absence***Of accused—Jurisdiction of magistrate—Cr. Code 853.*

1. The Criminal Code, sec. 853, authorizing a magistrate to determine the case in the defendant's absence on his default in appearance, must be restricted to the particular charge in the original information and cannot cover a distinctly different charge substituted by amendment in his absence. *EX PARTE DOHERTY.* (N.B.) 84

**Abusive Language***Summary Jurisdiction—Nova Scotia statute.*

1. One magistrate has no jurisdiction to convict on a charge of using abusive language under R.S. Nova Scotia, 5th series, c. 103, and 1889, N.S., c. 36. *R. v. McLEOD.* (N.S.) 10

**Address to Jury***Order of—Reserved case—Cr. Code 743.*

1. The question as to the order of addresses to the jury by counsel at the close of the evidence is not a question of law proper to be reserved for the opinion of a Court of Appeal under Cr. Code, sec. 743. *R. v. CONNOLLY.* (ONT.) 468

**Admissibility**

See EVIDENCE.

Effect of irregularity in taking depositions. 157, 160

**Admissions**

See EVIDENCE.

1. Objection to answer incriminating questions under Act of 1898 (Canada). 397  
To police officer, as evidence. 398

**Affidavit**

In support of certiorari application, practice regarding. 156

**Aggravated Assault**

See ASSAULT.

*Conviction—Bar of civil action—Cr. Code 783, (c.)*

1. A conviction upon a charge of aggravated assault tried by a magistrate under sec. 783 (c) of the Criminal Code, with the consent of the accused, and the payment of the fine thereby imposed, will constitute a bar to a civil action for damages for such assault. *HARDIGAN v. GRAHAM.* (QUE.) 437

*Summary trial—Cr. Code 864.*

2. The word "assaults" in sec. 864, Cr. Code, which authorizes a summary trial, unless the person aggrieved or the person accused objects, must be taken to include aggravated as well as common assaults. *IBID.* 437

**Agreement**

In criminal conspiracy.

262

**Allegiance**

1. As affecting legislative authority over extra-territorial acts.

172

*Oath of—Taking of, by judicial officers.*

2. All persons appointed to judicial offices in Canada are required to take the oaths of allegiance and of office before acting in their judicial capacity; and a person temporarily appointed to be Deputy Recorder of Montreal is under the same obligation. EX PARTE MAINVILLE. (QUE.) 528

**Alternative Remedy**

Effect on certiorari.

153, 154

**Amendment**

See CONVICTION.

See INFORMATION.

See WARRANT.

*Conviction for second offence—Failure to prove prior conviction.*

1. A conviction for a second offence which is defective for want of proof of any prior conviction should not be amended under Cr. Code, secs. 209, 210, so as to impose the lesser penalty applicable to a first offence, unless the court is satisfied, from a perusal of the depositions and after giving the accused the benefit of any reasonable doubt, that an offence is thereby proved. R. v. HERRELL. (MAN.) 510

*Conviction—Unauthorized penalty.*

2. Where the only penalty authorized has been imposed, but with an unauthorized addition, the latter may be struck out on amendment after its return under certiorari. EX PARTE NUGENT. (N.B.) 126

*Information—Absence of accused.*

3. An amendment of the information on a charge of selling liquor contrary to the Canadian Temperance Act to a charge of keeping liquor for sale cannot be made if the accused does not appear at the trial. EX PARTE DOHERTY. (N.B.) 84

*Information—On preliminary enquiry—Summary conviction on substituted charge.*

4. Magistrates conducting a preliminary enquiry in respect of an indictable offence, may not on its conclusion convict of a lesser offence over which they have summary jurisdiction,

**Amendment—Continued.**

- although proved by the evidence adduced, if no complaint was laid before them, nor the accused called upon to defend in respect of such lesser offence. *R. v. MINES.* (ONT.) 217
5. None for a distinct offence. 84, 91

***Of Conviction—Powers of, under Cr. Code 889—Review of evidence.***

6. To authorize the amendment of a conviction under Cr. Code, sec. 889, the court or judge must from the depositions be satisfied that, if trying the defendant in the first instance, the court or judge would have convicted upon that evidence. *R. v. HERRELL.* (MAN.) 510
7. Of conviction, time for return of amended conviction. 219
8. Of conviction to conform to adjudication, when permissible. 132

***Penalty in Conviction—Greater than authorised.***

9. A conviction under the Canada Temperance Act cannot be amended under sec. 117, if it imposes a "greater penalty than is authorized" by awarding ninety days imprisonment, which may possibly be more than three months, on non-payment of a fine where the statute prescribes a limit of three months. *R. v. GAVIN.* (N.S.) 59

***Summary conviction—Magistrate's discretion.***

10. The court should not amend a conviction if in doing so it has to exercise the discretion of the magistrate. *EX PARTE NUGENT.* (N.B.) 126

***Warrant of commitment—Certiorari—Return.***

11. Justices may return an amended or fresh warrant of commitment with the writ of certiorari and if it be sufficient the court will not enquire into the validity of a previous warrant, upon which the prisoner was held, which was bad for not following the conviction or disclosing any offence. *RE PLUNKETT.* (B.C.) 365

***Where conviction bad for uncertainty.***

12. A conviction bad on its face for uncertainty should be amended by the Court to which removed by certiorari, only when such Court can conclude on the evidence that an offence is thereby proved. *R. v. COULSON.* (ONT.) 114

**Animus Manendi**

1. Absence of as affecting extra-territorial Acts. 172

**Apothecary***Practice of medicine.*

1. The statutory right to practice as an "apothecary" does not authorize the practising of medicine. *R. v. HOWARTH. (ONT.)* 14

**Appeal***Abatement—Death of informant.*

1. An appeal under Criminal Code, 880, from a summary conviction to the General Sessions in a criminal case does not abate by the death of the informant. *R. v. FITZGERALD. (ONT.)* 420
2. Alternative right of. 126, 153

*British Columbia—Summary trial without consent.*

3. Cr. Code, sec. 784 (3), making the jurisdiction of the magistrate absolute in British Columbia, Prince Edward Island, etc., without the consent of the accused, in cases of summary trial for theft under \$10, etc., under sec. 783, has not the effect of preventing an appeal when two Justices of the Peace exercise the powers of a magistrate under Cr. Code, sec. 782 (a.3) and 782 (a.5). *R. v. WIRTH. (B.C.)* 231

*Certiorari not an appeal.*

4. Proceedings by way of certiorari against a summary conviction do not constitute an "appeal" under Cr. Code, sec. 897. *R. v. GRAHAM. (ONT.)* 405
5. None from summary trial with consent, by police magistrate for theft. 112, 113
6. Right of, effect on certiorari. 154

*Summary trial with consent.*

7. An appeal does not lie from the decision of a police magistrate who tries a charge of theft summarily with the consent of the accused. *R. v. EGAN. (MAN.)* 112

*Summary trial with consent.*

8. Cr. Code, sec. 808, prevents the application of any of the provisions as to appeals from summary convictions, (secs. 879-884,) to convictions under Part LV., (secs. 782-808), by a police magistrate on a summary trial with the consent of the accused. *IBID.* 112

**Arrest**

- On warrant from another province. 551

**Assault***Bar of civil action.*

1. A conviction upon a charge of assault occasioning bodily harm tried summarily by a magistrate with the consent of the

**Assault—Continued.**

accused, and the undergoing of the punishment imposed do not constitute a bar to a civil action for damages for the assault.

NEVILLS v. BALLARD. (ONT.) 434

2. Sec. 866, Cr. Code, applies to bar the civil action, only where the charge is triable summarily under sec. 864 without regard to the consent of the accused, and does not have that effect where the charge is under sec. 262 for the indictable offence of assault causing actual bodily harm. IBID. 434

**Bar of civil action—Aggravated assault.**

3. A conviction upon a charge of aggravated assault tried by a magistrate under sec. 783 (c) of the Criminal Code, with the consent of the accused, and the payment of the fine thereby imposed, will constitute a bar to a civil action for damages for such assault. HARDIGAN v. GRAHAM. (QUE.) 437

**Bar of civil action—Injury to clothing.**

4. The injury to clothing or loss of property from the person by reason of the assault does not constitute a cause of action distinguishable from the civil action for assault, and any claim in respect of such injury or loss will likewise be barred where sec. 866 Cr. Code applies. IBID. 437

**Consent to fight.**

5. A blow struck in anger or which is intended or is likely to do corporal hurt is a criminal assault, notwithstanding the consent to fight of the person struck. R. v. BUCHANAN. (MAN.) 442

**Construction of word—Cr. Code 864.**

6. The word "assaults" in sec. 864, Cr. Code, which authorizes a summary trial, unless the person aggrieved or the person accused objects, must be taken to include aggravated as well as common assaults. HARDIGAN v. GRAHAM. (QUE.) 437

**Associated Words**

1. It is immaterial whether the generic term precedes or follows the specific terms which are used; in either case the general word must take its meaning from, and be presumed to embrace only things or things of the kind designated in the specific words. R. v. FRANCE. (QUE.) 321

**Attempt**

To commit murder, cruelty to child. 413

**Bail****Constructive imprisonment.**

1. A person admitted to bail is in custody and is constructively in gaol, so as to entitle him to the benefit of a statute providing

**Bail—Continued.**

for the discharge of the accused from imprisonment in default of his indictment within a limited time. *R. v. H. B. CAMERON.* (QUE.) 169

*Right of speedy trial notwithstanding.*

2. The admission to bail under Cr. Code, sec. 601, does not deprive the accused of the right to a speedy trial under Cr. Code, sec. 765. *R. v. LAWRENCE.* (B.C.) 295
3. Surrender by. 301

*Surrender for speedy trial—Cr. Code 765.*

4. The words "committed to gaol for trial" used in Cr. Code, sec. 765, should be constructed as including any case where the accused is found in custody charged with an offence in respect of which he has the right to elect in favor of a speedy trial, and although he is so in custody by reason of his surrender for the purpose of appearing before the judge to elect a speedy trial after having been admitted to bail. *R. v. LAWRENCE.* (B.C.) 295

**Battery**

See ASSAULT.

**Bawdy House***Fine for keeping—Power to enforce payment.*

1. Upon conviction and fine for keeping a bawdy house the powers of a magistrate for enforcing payment of the fine are limited to directing imprisonment for a period not exceeding three months under Cr. Code, sec. 872 (a), although he might impose imprisonment for six months in the first instance instead of a fine. *R. v. STAFFORD.* (N.S.) 239

**Betting**

Acts partly extra-territorial. 290

**Bias**

1. Fixed appropriation to magistrate out of fines additional to salary. 410

*Magistrate—Membership in interested association.*

2. The connection of a magistrate with a society, which supplied funds part of which were used to make the purchase upon which the prosecution of illegal sale of liquor was based, because of his being an honorary member of the society but not entitled to take any part in its affairs, is not a ground of disqualification. *R. v. HERRELL.* (MAN.) 510
3. Of magistrate, membership in society interested in prosecution. 524

## Bigamy

1. Extra-territorial offence, jurisdiction of British or Canadian Parliament. 172
2. Imperial legislation affecting foreign bigamous marriage by British subject. 205, 206

### *Leaving Canada with intent to commit—Jurisdiction.*

3. The Parliament of Canada has jurisdiction to constitute the leaving Canada by a British subject resident therein with an intent to perform elsewhere a prohibited act, an indictable offence upon the act itself being performed. RE BIGAMY SECTIONS OF CODE. (CAN.) 172

## Bodily Harm

### *Assault occasioning—Conviction—Bar of civil action.*

1. A conviction on a charge of assault occasioning bodily harm tried summarily by a magistrate with consent of the accused and the undergoing of the punishment imposed do not constitute a bar to a civil action for damages for the assault. NEVILLS v. BALLARD. (ONT.) 434

## British Columbia

1. Appeal from two justices in British Columbia on summary trial without consent. 231
2. Game Protection Act (1895). 103
3. Liquor License Act, supplying liquor with meals. 317
4. Municipal Clauses Act, sec. 81. 91
5. Municipal Clauses Act, sec. 212. 81
6. Municipal trade license. 337

## British North America Act

See CONSTITUTIONAL LAW.

Powers of Canadian Parliament to legislate regarding criminal law. 183

## By-law

1. Municipal, infraction of, who may prosecute. 81

### *Proof of.*

2. Proof of a municipal by-law cannot be made by affidavit on a prosecution for an offence thereunder. R. v. BANKS. (N.W.T.) 370

### *Reasonableness—Sunday observance.*

3. A municipal by-law as to Sunday observance which exceeds in its prohibition the terms of the provincial law by including classes of persons not included by the latter is too wide in its scope, and is void for unreasonableness. R. v. PETERSKY. (B.C.) 91

**Cab-driving***Sunday observance.*

1. Cab-driving on Sunday is not an offence by the cab-driver under the Lord's Day Act of Ontario (R.S.O. 1897, c. 246; R.S.O. 1887, c. 203). *R. v. SOMERS.* (ONT.) 46

**Calculated to deceive***Trade mark—Resemblance.*

1. In cases under Cr. Code sec. 448, for falsely applying a mark so nearly resembling a trade mark as to be "calculated to deceive," it is not necessary that the resemblance should be such as to deceive persons who might see the two marks placed side by side, or who might examine them critically. *R. v. AUTHIER.* (QUE.) 68

**Canada Evidence Act (1893).***Civil action—Confiscation proceedings.*

1. In an action to recover from the constable and the clerk of the peace moneys seized in a common gaming house under confiscation proceedings the rules of evidence in force in the provinces in civil matters will apply, and not the Canada Evidence Act. *O'NEIL v. ATTORNEY GENERAL.* (CAN.) 303

*Former deposition in civil proceeding.*

2. The Canada Evidence Act, sec. 5, does not apply to exclude evidence given by the accused in a civil proceeding under the jurisdiction of a Provincial Legislature from being used in evidence against him in a subsequent criminal proceeding, and the same rule will apply although the examination in the civil proceeding was compulsory. *R. v. DOUGLAS.* (MAN.) 221

Sec. 2.	221
4. (2)	—457, 458, 459
5.	221, 373, 387, 388, 397
7.	551

**Canada Temperance Act***Amendment of information.*

1. An amendment of an information for "selling liquor" to an information for "keeping for sale" is not authorized in respect of proceedings under the Canada Temperance Act, for the magistrate cannot determine in the defendant's absence whether or not the latter has been "materially misled" by the variance (sec. 116). *EX PARTE DOHERTY.* (N.B.) 84
2. Application of fines under. 24

*Club—Sale of liquors to members.*

3. The disposal of liquors to the members of a social club by



**Canada Temperance Act—Continued.**

the club steward acting for the club who owned the same is an offence against the Canada Temperance Act, if such were a device to evade its provisions. *EX PARTE COULSON.* (N.B.) 31

*Excessive penalty.*

4. A conviction under the Canada Temperance Act imposes a "greater penalty than is authorized," by awarding ninety days imprisonment on non-payment of a fine where the statute prescribes a limit of three months, as such term may possibly be more than three months. *R. v. GAVIN.* (N.S.) 59

*Magistrate—Bias or interest.*

5. A magistrate is not disqualified on the ground of pecuniary interest from adjudicating upon an offence under the Canada Temperance Act, because he receives a fixed appropriation voted by a municipal council, in addition to his regular salary as magistrate, for his services in connection with the enforcement of the Canada Temperance Act, and because such appropriation is paid out of a fund created by the imposition of fines thereunder. *EX PARTE MCCOY.* (N.B.) 410

6. Municipal resolution to pay informers under. 22

7. Sale of liquor by club. 31

*Second offence.*

8. A conviction for a second offence under the Canada Temperance Act must shew that the second offence was committed after the information had been laid for the first offence. *EX PARTE LE BLANC.* (N.B.) 12

9. Unauthorized penalty on conviction for selling liquor. 59

**Carrying a pistol***Conviction—Sufficiency.*

1. A conviction for "procuring" a pistol with intent unlawfully to do injury to another person, is not to be held a sufficient conviction for "having on his person a pistol, etc.," and is bad as not disclosing an offence known to the law. *R. v. MINES.* (ONT.) 217

**Case reserved**

See RESERVED CASE.

*Criminal Court of Appeal.*

1. The decision of a Court of Appeal for Crown Cases Reserved is not binding upon other judges of co-ordinate jurisdiction, sitting as such court even in the same Province. *R. v. HAMMOND.* (ONT.) 373

2. Functions of judge in appeal as juryman. 278

**Caution**

See PRIVILEGE.

To witness as to incriminating himself. 379

**Certiorari***Acts non-judicial.*

1. Certiorari lies only to inferior tribunals or officers exercising judicial functions, and the act to be reviewed must be judicial in its nature. *Re NEW GLASGOW.* (N.S.) 22
2. The court has no jurisdiction to review or quash a ministerial or legislative act. *Re NEW GLASGOW.* (N.S.) 22

*Alternative right of appeal.*

3. Where a statute makes provision for an appeal from a summary conviction, the discretion of the Court as to granting a certiorari should be exercised by refusing the latter unless special circumstances are shewn therefor. *EX PARTE ROSS.* (N.B.) 153

*Copy of proceedings below.*

4. On a motion for a certiorari it is necessary to produce a copy of the proceedings sought to be removed. *EX PARTE EMMERSON.* (N.B.) 156

*Costs.*

5. Costs of quashing a conviction by certiorari proceedings are not awarded except in cases of misconduct of the informant or of the Justice. *R. v. BANKS.* (N.W.T.) 370
6. Costs of certiorari proceedings were refused to the justices as against the defendant in a case where the application was justifiable at the time it was launched. *RE PLUNKETT.* (B.C.) 365
7. Costs of quashing conviction. 46, 95
8. Costs where not opposed. 10
9. Grounds of application for, to be shewn by affidavit. 156
10. Instead of appeal as alternative remedy, discretion as to. 153
11. Limitation of time for application. 367

*Manitoba Practice Act.*

12. The Queen's Bench Act (Man.), 1895, does not apply to affect the practice in certiorari proceedings, and an application to quash a conviction is to be made by rule *nisi*, and not by notice of motion. *R. v. BEALE.* (MAN.) 235

*Municipal resolution.*

13. A town council which has passed a resolution to pay informers, other than the inspector, the costs and a proportion of the fine when collected in prosecutions under the Canada Temperance Act, does not thereby exercise a judicial function, and such a resolution is therefore not reviewable by certiorari. *RE NEW GLASGOW.* (N.S.) 22

**Certiorari—Continued.***Not an "appeal"—Cr. Code 897.*

14. Proceedings by way of certiorari against a summary conviction do not constitute an "appeal" under Cr. Code, sec. 897. *R. v. GRAHAM.* (ONT.) 405
15. Notice to magistrate of application for, is a condition precedent. 367, 368

*Notice of motion—Statutory requirement.*

16. A rule *nisi* for a certiorari made returnable six days or more after service thereof is not a sufficient compliance with the statute, (Imp.) 13 Geo. II. c. 8, s. 5, which requires six days previous notice of the motion for a certiorari to be given to the justices. *RE PLUNKETT.* (B.C.) 365

*Practice—Appeal.*

17. An *ex parte* order made by a judge of the High Court of Justice (Ontario) in a certiorari proceeding in a criminal matter is not subject to review or to be set aside by another judge sitting in "Weekly Court," but is appealable to a Divisional Court of the High Court sitting *en banc*. *RE GRAHAM.* (ONT.) 405

*Practice—Copy of proceedings.*

18. A rule *nisi* for certiorari was quashed in default of a copy of the proceedings sought to be removed being produced. *EX PARTE EMMERSON.* (N.B.) 156
19. Practice as to costs. 11
20. Renewal of application for, not allowed after failure in consequence of neglect. 156

*Review of findings.*

21. Findings of fact by the magistrate are not open to review on motion to quash conviction in certiorari proceedings, if there was evidence from which he might draw the conclusion he did. *EX PARTE COULSON.* (N.B.) 31
22. Review of findings of magistrate. 31, 114, 118, 126

*Rule Nisi—Grounds of motion.*

23. Objections on account of any omission or mistake in a conviction made by a magistrate must be set forth in the rule *nisi* in certiorari proceedings, or the same will not be allowed. *R. v. BEALE.* (MAN.) 235
24. Six days' notice required of application for. 367

*Statutory notice to justices.*

25. The Imperial Statute 13 Geo. II. c. 8, s. 5 is in force in British Columbia as well as in Ontario, and six days previous notice of the motion for a certiorari must be given to the justices. *RE PLUNKETT.* (B.C.) 365
26. Writ of, defined. 25

**Charge**

Ambiguity in judge's charge, effect of.

48

**Cheating**

See FALSE PRETENCES.

**Child**

1. Abduction of.

263

2. Cruelty to.

413

**Civil Action***Assault—Bar by conviction.*

1. A conviction upon a charge of aggravated assault tried by a magistrate under sec. 783 (c) of the Criminal Code, with the consent of the accused, and the payment of the fine thereby imposed, will constitute a bar to a civil action for damages for such assault. *HARDIGAN v. GRAHAM.* (QUE.) 437

2. Sec. 866, Cr. Code, applies to bar the civil action, only where the charge is triable summarily under sec. 864 without regard to the consent of the accused, and does not have that effect where the charge is under sec. 262 for the indictable offence of assault causing actual bodily harm. *NEVILLS v. BALLARD.* (ONT.) 434

3. The injury to clothing or loss of property from the person by reason of the assault does not constitute a cause of action distinguishable from the civil action for assault, and any claim in respect of such injury or loss will likewise be barred where sec. 866 Cr. Code applies. *HARDIGAN v. GRAHAM.* (QUE.) 437

*Former deposition in—Admissibility.*

4. The Canada Evidence Act, sec. 5, does not apply to exclude evidence given by the accused in a civil proceeding under the jurisdiction of a Provincial Legislature from being used in evidence against him in a subsequent criminal proceeding, and the same rule will apply although the examination in the civil proceeding was compulsory. *R. v. DOUGLAS.* (MAN.) 221

**Civil Wrong**

As object of conspiracy.

207

**Clerk of the Peace***Costs—Certiorari—Interlocutory motion.*

1. Costs awarded against a magistrate in respect of an unsuccessful interlocutory application made by him in certiorari proceedings are not governed by Cr. Code, sec. 897, and should be directed to be paid to the opposite party direct instead of to the clerk of the peace or other officer of the court which made the order. *R. v. GRAHAM.* (ONT.) 405

**Club***Disposal of liquors to members.*

1. The disposal of liquors to the members of a social club by the club steward acting for the club who owned the same is an offence against the Canada Temperance Act, if such were a device to evade its provisions. *EX PARTE COULSON.* (N.B.) 31

**Coinage offences**

See COUNTERFEITING.

**Collateral Attack***Adjudication of forfeiture.*

1. A judgment of forfeiture in criminal proceedings of money found in a common gaming house is not subject to collateral attack in a civil action brought for the recovery of the moneys. *O'NEIL v. ATTORNEY-GENERAL.* (CAN.) 303

**Colonial Laws**

Imperial legislation to remove doubts as to validity of. 203

**Comment**

1. On failure of person charged to give evidence. 389

*On failure to testify—Error.*

2. Comment by the prosecuting counsel before the jury in respect of the failure of prisoner's wife to testify, which is prohibited by the Canada Evidence Act, sec. 4, is error entitling the prisoner to a new trial. *R. v. CORBY.* (N.S.) 457

*On failure to testify—Time for objection.*

3. Objection to comment by the prosecuting counsel upon the failure of the prisoner's wife to testify is not waived because not taken at the time, and it is sufficient if drawn to the attention of the trial judge after the jury have retired to deliberate. *R. v. CORBY.* (N.S.) 457

**Commissioner of Dominion Police***Limitation of representative capacity.*

1. The person filling the office of Commissioner of the Dominion Police has, as such, no legal capacity to represent and act on behalf of Her Majesty the Queen, and in laying an information in which he designated himself as such Commissioner of the Dominion Police he acted as a private individual and not as the legal representative of the Crown, although he declared therein that he was acting as such Commissioner on behalf of Her Majesty the Queen. *R. v. ST. LOUIS.* (QUE.) 141

*Recognisance to prosecute—Liability for costs.*

2. The accused having been discharged on the preliminary

**Commissioner of Dominion Police—Continued.**

inquiry and the Commissioner having bound himself by recognition to prefer and prosecute an indictment on the charge contained in his information, and the Grand Jury having thrown out the bill of indictment, the Commissioner was held, under art. 595 of the Criminal Code, to be personally liable for the costs incurred by the accused on the preliminary inquiry and before the Court of Queen's Bench. *IBID.*

141

**Commitment**

1. As an alternative procedure to distress.

91

*Distress—Alternative remedy.*

2. Under the B.C. Municipal Clauses Act, 1896, s. 81, it is not necessary to issue the distress authorized thereby before issuing a commitment, but the latter course may be taken as an alternative procedure. *R. v. PETERSKY.* (B.C.)

91

3. Form of warrant of, in County Judge's Criminal Court.

540

4. Illegal to make commitment for trial on Sunday.

134

*Unauthorized conditions of discharge.*

5. A warrant of commitment illegal by reason of the same including unauthorized terms of discharge is bad not only as regards the part in which such unauthorized conditions are mentioned but in whole, and must be quashed. *EX PARTE LON KAI LONG.* (QUE.)

120

*Warrant of—Irregularity.*

6. The precept of a warrant of commitment must conform strictly to the directions of the statute which authorizes an incarceration, with respect to the conditions upon which a prisoner can obtain his discharge before the expiration of the term to which he has been condemned. *IBID.*

120

7. If the return on habeas corpus is of a warrant of commitment by the County Judge's Criminal Court for theft, which however does not specify such facts as would show on its face that the theft was of such a nature as to give jurisdiction to the County Judge's Criminal Court to impose the imprisonment stated, still the prisoner cannot be discharged upon habeas corpus. *R. v. BURKE.* (N.S.)

539

**Committal**

Meaning of

302

**"Committed to gaol for trial"***Interpretation—Cr. Code 765.*

1. The words "committed to gaol for trial" used in Cr. Code, sec. 765, should be construed as including any case where the

**"Committed to goal for trial"—Continued.**

accused is found in custody charged with an offence in respect of which he has the right to elect in favor of a speedy trial, and although he is so in custody by reason of his surrender for the purpose of appearing before the judge to elect a speedy trial after having been admitted to bail. *R. v. LAWRENCE.* (B.C.) 295

**Common gaming house**

Offence of keeping. 287, 293

**Company**

1. False statement of affairs by director, incorporation under company law of another province, judicial notice of status of president as director. 551

*False statement of affairs—Mailing—Locality of crime.*

2. A charge against the president of an incorporated trading company of having made and published a statement of its affairs knowing the same to be false and with intent to defraud, may be tried either in the province in which the statement was despatched by mail to the party defrauded, or in the province in which it is received by mail at the address to which the defendant directed it. *R. v. GILLESPIE.* (QUE.) 551

3. Where a false statement of a company's affairs is mailed in one province addressed to and received by a person in another province, the offence is commenced in the province where the letter containing the statement was mailed, and is continued and completed in the province to which it was sent, and under Cr. Code sec. 553 (b) is to be considered as completed in either jurisdiction. *IBID.* 551

*President—Status as director—Cr. Code 365.*

4. In considering a charge against the "president" of an incorporated company for publishing a false statement under Cr. Code sec. 365, which in terms applies to directors or managers of companies, judicial notice will be taken of the statutes of another province under which the company was incorporated, requiring the president to be chosen from the directors; and a warrant of commitment against the president, as such, after proof of the manner of incorporation, need not allege that he was a director. *IBID.* 551

**Complaint**

See INFORMATION.

**Compounding**

When an offence to compound misdemeanor. 316

**Concurrent Sentence***No presumption of.*

1. A prisoner convicted at the one time of two offences and sentenced on each to three months' imprisonment without specification as to the terms being concurrent or otherwise, is not entitled to a discharge on *habeas corpus* after three months' imprisonment. EX PARTE BISHOP. (N.B.) 118

**Conditions of discharge***Commitment—Unauthorised conditions.*

1. In case a warrant of commitment is illegal by reason of the same including unauthorized conditions of discharge, it is bad not only as regards the part in which such conditions are mentioned but in whole, and must be quashed. EX PARTE LON KAI LONG. (QUE.) 120

**Conduct***Inference from—Proof of intent.*

1. For the purpose of proving "intent to steal" it is sufficient if an inference of such intent is deducible from the acts and conduct of the prisoner as shewn by the evidence. R. v. GIBBONS. (MAN.) 340
2. Of parent as proof of consent in abduction cases. 286

**Confession**

1. Admission on interrogation by police officer or person in authority. 398

*Evidence before coroner.*

2. A witness at a coroner's inquest, who is sent for by the coroner and returns with the constable, who acted as the coroner's messenger, and who is bound in law to answer incriminating questions whether or not he objects, is none the less giving evidence under compulsion because he expresses before the coroner a wish to give his evidence, and such evidence is not a voluntary confession or admission. R. v. HAMMOND. (ONT.) 373

**Confession and Avoidance**

- Of return, evidence on *habeas corpus* proceedings. 134, 140

**Consent**

1. Conduct as proof of. 286
2. Effect of, in charge of assault. 442, 450

*Of assaulted party to fight.*

3. A blow struck in anger or which is intended or is likely to do corporal hurt is a criminal assault, notwithstanding the consent to fight of the person struck. R. v. BUCHANAN. (MAN.) 412



**Consent—Continued.**

4. Of prisoner as affecting irregularity in trial. 465
5. Summary trial by magistrate with, effect as to appeal. 112, 113

*In British Columbia.*

6. Summary trial without consent, right of appeal. 231

*Trial before police magistrate—Extended jurisdiction.*

7. If a prisoner consents to be tried by a police magistrate having the extended powers of a Court of General Sessions where such consent is given, he is liable to sentence for the more onerous punishment which the General Sessions might impose in excess of the powers of an ordinary magistrate, although the charge is for an offence over which the magistrate has jurisdiction without the consent, but in the latter case limited to the less onerous punishment. R. v. CONLIN. (ONT.) 41

**Conspiracy**

1. An otherwise lawful act not unlawful because of malicious motive. 215
2. Definition of. 259

*Evidence.*

3. In a charge of conspiracy, it is not necessary to prove that the parties came together and actually agreed in terms to carry out their common design ; but the jury may group the detached acts of the parties severally, and view them as indicating a concerted purpose on the part of all as proof of the alleged conspiracy. R. v. CONNOLLY. (ONT.) 468
4. When the existence of the common design on the part of the defendants has been proved, evidence is then properly receivable as against both of what was said or done by either in furtherance of the common design. IBID. 468
5. Evidence is admissible of what was said or done in furtherance of the common design by a conspirator not charged, as against those who are charged, after proof of the existence of the common design on the part of the defendants with such conspirator. IBID. 468

*Failure of object.*

6. A conspiracy to defraud is indictable, although the conspirators have been unsuccessful in carrying out the fraud. R. v. FRAWLEY. (ONT.) 253

*Indictment—Parties.*

7. One conspirator may be indicted and convicted without joining the others, although living and within the jurisdiction. IBID. 253
8. Indictment valid although means of conspiracy not stated. 216

**Conspiracy—Continued.***Locality of Crime—Overt Act.*

9. Any overt act of conspiracy is to be viewed as a renewal or continuation of the original agreement made by all of the conspirators, and, if done in another jurisdiction than that in which the original concerted purpose was formed, jurisdiction will then attach to authorize the trial of the charge in such other jurisdiction. *R. v. CONNOLLY.* (ONT.) 468

*Overt Act.*

10. The bare consulting of those who merely deliberate in regard to the proposed conspiracy, although they may not agree on a plan of action, is of itself an overt act. *IBID.* 468

*To commit a civil wrong.*

11. Conspiracy to defraud is indictable although the object was to commit a civil wrong, and although if carried out the act agreed upon would not constitute a crime. *R. v. DEFRIES.* (ONT.) 207

12. Unlawful purpose and unlawful means as affecting. 215

*Venue.*

13. The venue in an indictment for conspiracy may be laid either where the agreement was entered into or where any overt act was done in pursuance of the common design. *R. v. CONNOLLY.* (ONT.) 468

14. When particulars may be ordered on application of accused. 216

15. Where prosecutor a party to fraud. 215

**Constitutional Law***Bigamy—Extra-territorial act—Leaving Canada with intent to commit.*

1. The Parliament of Canada has jurisdiction to constitute the leaving Canada by a British subject resident therein with an intent to perform elsewhere a prohibited act an indictable offence, upon the act itself being performed. *Re BIGAMY SECTIONS.* (CAN.) 172

*Confiscation in criminal proceedings.*

2. A statutory provision by the Parliament of Canada, purporting to authorize a magistrate to adjudge forfeiture to the Crown of moneys, etc., found in a common gaming house, and declaring the keeping of a gaming house a criminal offence, and imposing punishment therefor, is not *ultra vires*, and the judgment of confiscation is not an interference with "property and civil rights," the jurisdiction in regard to which belongs

**Constitutional Law—Continued.**

to the provinces, although the party claiming the money was not a party to the proceedings in which the confiscation was decreed. *O'NEIL v. ATTORNEY-GENERAL.* (CAN.) 303

*Provincial statute before B.N.A. Act.*

3. A Provincial statute relating to criminal law passed before Confederation becomes as to that province a part of the criminal law of Canada, and is subject to repeal or amendment by a Dominion statute only. *R. v. HALIFAX ELECTRIC CO.* (N.S.) 424

*Provincial Statute—Repeal.*

4. A statute of the legislature of the Province of Quebec purporting to repeal the Act passed before confederation, conferring the right to a mixed jury, is *ultra vires* so far as such right is sought to be affected. *R. v. SHEEHAN.* (QUE.) 402

**Construction of Statute**

1. Ambiguous statute, rule as to. 123
2. Description of offence created. 103, 108

*Game protection law.*

3. The generality of the prohibition contained in the Game Protection Act (B.C.) 1895, sec. 7, against purchasers having in possession with intent to export, or causing to be exported, etc., game, etc., is not to be limited by inference to game killed within the Province. *R. v. STRAUSS.* (B.C.) 103

*Generic words.*

4. It is immaterial whether the generic term precedes or follows the specific terms which are used; in either case the general word must take its meaning, and be presumed to embrace only things or persons of the kind designated in the specific words. *R. v. FRANCE.* (QUE.) 321

*Generic words—"Other."*

5. Generic words following specific words are not restricted in their primary meaning because preceded by the word "other." *R. v. WALSH.* (ONT.) 109
6. Relation of generic and specific words. 109, 112, 321
7. When extra-territorial acts a material part of offence. 172, 192

**Continuing offence**

Mailing false statement of company's affairs, offence continues where received. 551

**Contradiction of return**

Evidence by affidavit inadmissible for. 134, 140

**Controverted Elections Act (Can.)**

Section 39.

389

**Controverting return**

See RETURN.

**Conviction**

1. Addition of unauthorized penalty in.

126

*Amendment—Cr. Code 889.*

2. To authorize the amendment of a conviction under Cr. Code, sec. 889, the court or judge must from the depositions be satisfied that if trying the defendant in the first instance, the court or judge would have convicted upon that evidence. *R. v. HERRELL.* (MAN.)

510

3. Amendment of, not to be made to interfere with exercise of magistrate's discretion.

132

4. At one time for two offences, presumptions.

118

5. Bad for uncertainty, amendment of.

114

*Extradition after—Practice.*

6. In the case of a fugitive who has been convicted and whose extradition is sought, the judge does not examine the evidence given at his trial and must not revise the verdict of the jury; his duty is to see if the offence is an extradition crime, if the conviction, after a regular trial, has been duly proved, and if the prisoner has been identified. *RE LEVI.* (QUE.)

74

7. Greater penalty than authorized.

59

*Keeping bawdy house—Cr. Code 872 (b).*

8. Upon conviction and fine for keeping a bawdy house the powers of a magistrate for enforcing payment of the fine are limited to directing imprisonment for a period not exceeding three months under Cr. Code., sec. 872 (b), although he might impose imprisonment for six months in the first instance instead of a fine. *R. v. STAFFORD.* (N.S.)

239

*Offence unknown to the law.*

9. A conviction for "procuring" a pistol with intent unlawfully to do injury to another person, is not to be held a sufficient conviction for "having on his person a pistol, etc.," and is bad as not disclosing an offence known to the law. *R. v. MINES.* (ONT.)

217

*Second offence.*

10. A conviction for a second offence which is defective for want of proof of any prior conviction should not be amended under Cr. Code, secs. 209, 210, so as to impose the lesser penalty applicable to a first offence, unless the Court is satis-

**Conviction—Continued.**

fied, from a perusal of the depositions and after giving the accused the benefit of any reasonable doubt, that an offence is thereby proved. *R. v. HERRELL.* (MAN.) 510

*Transient Traders' License By-law.*

11. In a prosecution under a by-law for licensing transient traders and other persons who occupy premises in the municipality for temporary periods, it is necessary that the conviction should state that the defendant was a transient trader or other person occupying premises, etc., in the terms of the by-law; and a conviction for "carrying on the business of a sewing machine agent, without first having obtained a license so to do, contrary to the by-law" is not in compliance with such rule and is therefore bad. *R. v. BANKS.* (N.W.T.) 370

12. Uncertainty in. 46

**Copy**

Of proceedings below, on certiorari application, practice regarding. 156

**Coroner**

1. Depositions of accused at inquest, admissibility. 373
2. Duty of in taking down depositions at inquest. 157, 160

*Evidence—Privilege—Incriminating answers.*

3. A witness before a Coroner's Court is compelled under the Canada Evidence Act to answer incriminating questions, such court being a criminal court and a court of record, and proceedings before the coroner are within the jurisdiction of the Federal Parliament, although no one is there charged with the offence of causing the death of the deceased. *R. v. HAMMOND.* (ONT.) 373
4. No right to take statement not under oath. 388
5. No trial on inquisition of. 386

**Corporations**

See COMPANY.

*Sunday observance—Provincial Act—Ultra vires.*

1. A Sunday observance criminal law of Nova Scotia passed before Confederation which applied to individuals only, cannot be amended by the legislature of that province so as to apply to corporations, and a provincial Act purporting to so amend was held to be *ultra vires*. *R. v. HALIFAX ELECTRIC CO.* (N.S.) 424

**Corroboration**

Acts of co-conspirator in furtherance of common design. 468

*Seduction.*

1. The corroborative evidence "implicating" the accused which

**Corroboration—Continued.**

is made necessary by Criminal Code, sec. 684, to sustain a charge of seduction of a girl under sixteen may consist of the prisoner's admission made after she attained sixteen that he had had connection with her. *R. v. WYSE.* (N.W.T.) 6

2. A statement made by the accused before he was charged with the offence that he had been advised that if he could get the girl to marry him he would escape "punishment," is corroborative evidence "implicating" the accused and proper to be considered by a jury or by a judge exercising the functions of a jury. *IBID.* 6

**Costs**

*After recognizance to prosecute—Cr. Code, 595.*

1. The costs to be allowed under a recognizance under Cr. Code, 595, taken to prefer an indictment after the justice has discharged the accused are not the fees and disbursements paid by the accused to his counsel, such payment being a matter between client and counsel, but such costs as are analagous to the costs recoverable from a losing party in a civil suit. *R. v. ST. LOUIS.* (QUE.) 141

2. The costs recoverable under a recognizance given to prefer an indictment after the justice has discharged the accused should be taxed according to a tariff made for criminal proceedings, and in the absence of such tariff they are to be taxed in the discretion of the judge, by implication, according to the spirit of the provisions contained in art. 835 of the Criminal Code. (IBID.) 141

*Certiorari—Practice.*

3. Costs of quashing a conviction by *certiorari* proceedings are not awarded except in cases of misconduct of the informant or of the justice. *R. v. BANKS.* (N.W.T.) 370

4. Costs of *certiorari* proceedings were refused to the justices as against the defendant as the application was justifiable at the time it was launched. *RE PLUNKETT.* (B.C.) 365

5. Costs of quashing a conviction are recoverable by action where no order of protection is made. *R. v. SOMERS.* (ONT.) 46

6. The practice is not to order costs against the informant on quashing a conviction. *R. v. SOMERS.* (ONT.) 46

7. A motion to quash a conviction being unopposed, no costs were allowed and terms were imposed that no action should be brought by defendant. *R. v. MCLEOD.* (N.S.) 10

8. Costs awarded against a magistrate in respect of an unsuccessful interlocutory application made by him in *certiorari* proceedings are not governed by Cr. Code, sec. 897, and should be

**Costs—Continued.**

directed to be paid to the opposite party direct, instead of to the clerk of the peace or other officer of the court which made the order. *R. v. GRAHAM.* (ONT.) 405

*Commissioner of Dominion Police—Liability for.*

9. The accused having been discharged on the preliminary inquiry, and the Commissioner of Dominion Police having bound himself by recognizance to prefer and prosecute an indictment on the charge contained in his information, and the Grand Jury having thrown out the bill of indictment, the Commissioner was held, under art. 595 of the Criminal Code, to be personally liable for the costs incurred by the accused on the preliminary inquiry and before the Court of Queen's Bench. *R. v. ST. LOUIS.* (QUE.) 141

*Enforcement of Payment—Cr. Code 898.*

10. The proceedings for enforcement of an order for costs provided by Cr. Code, sec. 898, apply only to costs dealt with by a Court of General Sessions on affirming or quashing a conviction or order on appeal to that court, and not to costs in *certiorari* proceedings. *R. v. GRAHAM.* (ONT.) 405

*Imprisonment—Discharge on payment of fine.*

11. When the authorizing statute states that a person who is condemned to a term of imprisonment in default of the payment of a fine and costs, can obtain his discharge before the expiration of such term upon the payment of the fine, it is illegal to require in addition the payment of the costs of the prosecution and of the charges of his conveyance to prison. *EX PARTE LON KAI LONG.* (QUE.) 120

12. On amendment of conviction after removal. 132

13. Where motion to quash conviction unopposed. 10

**Counsel**

1. Failure to object to jurisdiction of "de facto" judge. 532
2. Improper comment by prosecuting counsel on failure to testify. 457
3. Right of reply. 468

**Counterfeiting***Counterfeits.*

1. Not *in esse*, doubt as to offence in selling. 168

*Purporting to be counterfeit.*

2. A paper which is a spurious imitation of a government treasury note is a counterfeit, or what purports to be a counterfeit token of value under Cr. Code, sec. 479, although there is no original of its description. *R. v. COREY.* (N.B.) 161

**County Judge's Criminal Court**

1. A court of record, review by writ of error. 452, 455

*Constitution and power.*

2. The judge of the County Judge's Criminal Court is invested as to proceedings within the jurisdiction of that Court with the like powers as belong to a Superior Court judge. *R. v. BURKE.* (N.S.) 539

3. Constitution of, in Nova Scotia. 546

4. Constitution of, in Ontario. 455

*Habeas Corpus.*

5. Habeas Corpus proceedings do not lie to inquire into the validity of a conviction made at a County Judge's Criminal Court as the latter is a court of record. *R. v. MURRAY.* (ONT.) 452
6. Powers as of a Superior Court, no review on *habeas corpus.* 539

**Court of Record**

1. Coroner's Court is. 373
2. Meaning of. 542

*Review of proceedings.*

3. Proceedings of a court of record can be reviewed only upon a writ of error. *R. v. MURRAY.* (ONT.) 452

**Crime**

See CONSTITUTIONAL LAW.

See CRIMINAL LAW.

See LOCALITY OF CRIME.

**Criminal Code, of 1892**

Section 64.	253
108.	217
195.	324
196.	287, 294, 321
197.	324
198.	287, 321
207 (1).	63
208.	239
209.	510
210.	28, 413, 414, 510
215.	413, 414, 416
232.	413, 414
236.	246
262.	434, 435, 437
272.	246
275.	172, 205
276.	172
283.	263



**Criminal Code of 1892—Continued.**

Section 302.	55
323.	541
337.	235, 541
339.	541
341.	541
342.	541
344.	41
365.	551
394.	207, 253
403.	48
404.	340
434.	164
446.	243
447.	243
448.	68
474.	168
479.	161
480.	164
535.	169, 171
539.	546
553 (b).	551
554 (b).	551
564.	134
568.	396
575.	303, 307
590.	160
591.	160
593.	160
596.	295
601.	295
611.	413, 415
616.	216
617.	486
634.	55
641.	447
642.	386, 396
645.	442
661.	489, 502
665.	403
670.	402
684.	6
710.	243
729.	134
743.	468

**Criminal Code of 1892—Continued.**

Section 746.	487
748.	1
752.	207
765.	295, 546
766.	96, 102, 453
782 (a 3).	231
782 (a 5).	231
783.	528
783 (a).	41, 112, 232
783 (b).	41
783 (c).	437
783 (f).	232, 321
784 (1).	323
784 (3).	232
785.	41
786.	436
788.	239
799.	435, 436, 437
808.	112
833.	151
839.	526
840.	435
842.	132
853.	84
856.	436
861.	439
862.	439
864.	434, 435, 437
865.	438
866.	434, 435, 437
872 (a).	59
872 (b).	239
880.	420
883.	526
889.	510, 515, 522, 523, 526
890.	510, 522
892.	405
895.	406
896.	406
897.	405, 406
898.	405, 406
900.	108
909.	526
Form MM.	542
Form NN.	542

**Criminal Conspiracy**

See CONSPIRACY.

**Criminal Law**

See CONSTITUTIONAL LAW.

*Provincial Statutes—Repeal.*

1A. Provincial statute relating to criminal law passed before Confederation becomes as to that province a part of the criminal law of Canada, and is subject to repeal or amendment by a Dominion statute only. *R. v. HALIFAX ELECTRIC CO.* (N.S.) 424

*Quasi-criminal legislation—Jurisdiction.*

2. If it appears that provincial legislation deals with public wrongs and imposes penalties in respect thereof for the enforcement of which all citizens should have an equal interest as distinguished from enactments passed for the protection of a particular class or the regulation of the dealings or business of a certain class, as for example between master and servant, such legislation as to public wrongs is within the exclusive jurisdiction of the Dominion Parliament, although similar legislation as applied to various classes only and not to the public generally would be within provincial jurisdiction as dealing with "civil rights." *IBID.*

424

**Criminal Libel**

See LIBEL.

**Criminal Procedure Act**

Sec. 5.

546

**Criminating Answers**

See EVIDENCE.

See PRIVILEGE.

**Cross-Examination**

See EVIDENCE.

**Crown**

See REPLY, RIGHT OF.

**Crown Officer***Commissioner of Dominion Police.*

1. The person filling the office of Commissioner of the Dominion Police has, as such, no legal capacity to represent and act on behalf of Her Majesty the Queen, and in laying an information in which he designated himself as such Commissioner of the Dominion Police he acted as a private individual and not as the legal representative of the Crown, although he declared therein that he was acting as such Commissioner on behalf of Her Majesty the Queen. *R. v. ST. LOUIS.*

(QUE.) 141

**Cruelty***Evidence—Admissibility.*

1. Upon a charge of causing grievous bodily harm to a child under defendant's care with intent to bring about the child's death, evidence of acts of cruelty by defendants to another child also in defendants' care are irrelevant to the case and inadmissible. *R. v. LAPIERRE.* (QUE.) 413

**Custody**

- Person admitted to bail is in "custody." 169

**Death of Informant**

See ABATEMENT.

**Decision***Criminal Court of Appeal.*

1. The decision of a Court of Appeal for Crown Cases Reserved is not binding upon other judges of co-ordinate jurisdiction, sitting as such court even in the same province. *R. v. HAMMOND.* (ONT.) 373

**De Facto Judge**

See DE FACTO OFFICER.

*Failure to qualify.*

1. The failure of a judicial officer to take the oath of allegiance and the oath of office where he has acted as the holder of the office and has been acknowledged and accepted as the duly qualified incumbent thereof by the public does not invalidate his judgments in criminal cases where his qualification has not been contested at the time of the trial, and his judgments are valid and binding as having been rendered by a judge *de facto*. *EX PARTE CURRY.* (QUE.) 532
2. Jurisdiction, failure to take oath of allegiance and oath of office, objection by accused. 528

**De Facto Officer**

See DE FACTO JUDGE.

*Validity of official acts.*

1. The acts of a *de facto* officer, assuming to exercise the functions of an office to which he has no legal title, are, as regards all persons but the holder of the legal title, legal and binding. *O'NEIL v. ATTORNEY GENERAL.* (CAN.) 303

**De Facto Possession**

- By father, abandonment of by child. 263

**Defamatory Libel**

See LIBEL.

**Defect**

See AMENDMENT.

1. In *certiorari* proceedings, when a bar to a renewed application. 156
2. In manner of taking depositions, effect of. 157

**Demand with Menaces**

1. Evidence of want of reasonable and probable cause. 48
2. Sufficiency of. 53

**Depositions**

See EVIDENCE.

*In civil proceeding—Admissibility.*

1. The Canada Evidence Act, sec. 5, does not apply to exclude evidence given by the accused in a civil proceeding under the jurisdiction of a provincial legislature from being used in evidence against him in a subsequent criminal proceeding, and the same rule will apply although the examination in the civil proceeding was compulsory. *R. v. DOUGLAS.* (MAN.) 221
2. Manner of taking before a magistrate. 160
3. Right to a copy of. 160

*Summary of—Admissibility.*

4. Notes of evidence taken by the coroner at an inquest which do not contain the precise expressions of the witness, but a summary only of the evidence, are not admissible in contradiction of the witness' testimony in a subsequent proceeding unless signed by the witness, or unless read over to and acquiesced in by him; but the witness may in such case be cross-examined as to any material statements made by him at the inquest, and witnesses may be called to show that he then made a different and contradictory statement. *R. v. CIARLO.* (QUE.) 157

**Deputy Officials***Deputy High Constable—Appointment.*

1. A high constable, having a commission as such from the Crown and not exercising a delegated authority, can legally appoint a deputy to act during his temporary absence. *O'NEIL v. ATTORNEY GENERAL.* (CAN.) 303
2. Deputy high constable, power of as regards gaming houses. 303, 315
3. Deputy recorder of Montreal, necessity of taking oath of office, etc. 532

*Deputy Recorder of Montreal—Qualification.*

4. All persons appointed to judicial offices in Canada are required to take the oaths of allegiance and of office before acting in their judicial capacity; and a person temporarily appointed to be deputy Recorder of Montreal is under the same obligation. *EX PARTE MAINVILLE.* (QUE.) 528

**Description**

1. In indictment, effect of particulars as an amendment. 486

*Of offence in information.*

2. An information should give a concise and legal description of the offence charged, and should contain the same certainty as an indictment, and the description of the charge must include every ingredient required by the statute to constitute the offence. *R. v. FRANCE.* (QUE.) 321

**Device**

- Intended to evade statute. 31, 317

**"Dies non"**

1. Judicial proceedings on Sunday, when invalid. 134, 140
2. Preliminary inquiry held on a statutory holiday. 452

**Direction**

1. The rule that comment by counsel for the prosecution upon the failure of the prisoner's wife to testify is ground for a new trial is to be applied notwithstanding a subsequent withdrawal of the comment and notwithstanding the judge's direction to the jury to disregard it. *R. v. CORBY.* (N.S.) 457

**Director of Company***President—False statement of affairs.*

1. In considering a charge against the "president" of an incorporated company for publishing a false statement under Cr. Code, sec. 365, which in terms applies to directors or managers of companies, judicial notice will be taken of the statutes of another province under which the company was incorporated, requiring the president to be chosen from the directors; and a warrant of commitment against the president, as such, after proof of the manner of incorporation, need not allege that he was a director. *R. v. GILLESPIE.* (QUE.) 551

**Discharge***From imprisonment—Unauthorized conditions of.*

1. When the authorizing statute states that a person who is condemned to a term of imprisonment in default of the payment of a fine and costs, can obtain his discharge before the expiration of such term upon the payment of the fine, it is illegal to require in addition the payment of the costs of the prosecution and of the charges of his conveyance to prison. *EX PARTE LON KAI LONG.* (QUE.) 120
2. Form of order for, on habeas corpus. 242
3. Return of amended conviction to be before discharge from custody. 219
4. Unauthorized conditions of in commitment. 120

**Discretion***Of magistrate—Amendment of conviction.*

1. The court should not amend a conviction if in doing so it has to exercise the discretion of the magistrate. *EX PARTE NUGENT.* (N.B.) 126
2. To allow *certiorari* where an alternative right of appeal. 126
3. To grant or refuse *certiorari*. 153

**Dismissal**

- Death of prosecutor as ground of. . 423

**Disorderly House**

1. Conviction for being an inmate of. 528

*Interpretation—Cr. Code, 783 (f), 784.*

2. The meaning of the words "disorderly house" in Cr. Code, sec. 783 (a) and sec. 784, is governed by the rule *noscitur a sociis*, and is therefore restricted to houses of the nature and kind of a house of ill-fame or bawdy house. *R. v. FRANCE.* (QUE.) 321

**Disposal***Meaning of.*

1. The words "sale or other disposal" in a liquor license statute are to be construed as including a gift. *R. v. WALSH.* (ONT.) 109
2. Of liquor, meaning of. 320

**Disqualification***Interest or bias of magistrate.*

1. The connection of the magistrate with a society, which supplied funds part of which were used to make the purchase upon which the prosecution of illegal sale of liquor was based, because of his being an honorary member of the society but not entitled to take any part in its affairs, is not a ground of disqualification. *R. v. HERRELL.* (MAN.) 510

*Judicial officer—Failure to subscribe oaths.*

2. The failure of a judicial officer to take the oath of allegiance and the oath of office where he has acted as the holder of the office and has been acknowledged and accepted as the duly qualified incumbent thereof by the public does not invalidate his judgments in criminal cases where his qualification has not been contested at the time of the trial, and such judgments are valid and binding as having been rendered by a judge *de facto*. *EX PARTE CURRY.* (QUE.) 532

*Objection to jurisdiction.*

3. If the accused takes objection at the trial to the qualification

**Disqualification—Continued.**

of the magistrate to act in the case because of his failure to take such oaths, public acquiescence in his exercise of judicial functions will not avail to make his adjudication binding, and he cannot claim to be in the position of a judge *de facto*, and the accused convicted under Cr. Code 783 under such circumstances is entitled to be released from custody upon *habeas corpus*. *EX PARTE MAINVILLE*. (QUE.) 528

4. Of magistrate, connection with temperance society as affecting liquor license prosecution. 517
5. Of magistrate, pecuniary interest as ground of. 410, 411
6. Of magistrate, relationship to prosecutor. 513

**Distinct offence**

*Amendment—Absence of accused.*

1. The Criminal Code, sec. 853, authorizing a magistrate to determine the case in the defendant's absence on his default in appearance, must be restricted to the particular charge in the original information and cannot cover a distinct offence to charge which the information is amended. *EX PARTE DOHERTY*. (N.B.) 84
2. Jurisdiction of magistrate as to, on preliminary enquiry. 217

**Distress**

See CONVICTION.

*Before commitment.*

1. Under the Municipal Clauses Act (B.C.), 1896, s. 81, it is not necessary to issue the distress authorized thereby before issuing a commitment, but the latter course may be taken as an alternative procedure. *R. v. PETERSKY*. (B.C.) 91

**Domicile**

*Jurisdiction—Extra-territorial act—Constitutional law.*

2. A British subject domiciled in Canada, and only temporarily absent, continues to owe to Her Majesty in relation to her government of Canada an obligation to refrain from the completion, whilst absent without any *animus manendi*, of a prohibited act, a material part of which is committed by him in Canada. *RE BIGAMY SECTIONS OF CODE*. (CAN.) 172

**Dominion**

Canadian provinces constituted a "Dominion," implying a semi-sovereign position. 200, 202

**Dominion Day**

Trial and conviction on, invalid. 454



**Druggist***Ontario Medical Act.*

1. A druggist is liable under R.S.O. 1897, c. 176 ; R.S.O. 1887, c. 148; for practising medicine without license if he assumes to discover the nature of the disease by enquiry from the purchaser as to the symptoms and advises the remedy he supplies. R. v. HOWARTH. (ONT.) 14

*Ontario Medical Act.*

2. If the purchaser tells the druggist his complaint, taking upon himself the determination of the symptoms, the druggist may legally inform him what remedies he has and advise as to the best remedy. IBID. 14

*Practising medicine.*

3. The fact that no additional charge was made above the ordinary price of the remedy by the druggist who diagnosed the case and prescribed a remedy does not make the transaction any the less a practising for gain, nor lead to the inference that the consideration should apply wholly to the price of the medicine, and not to the advice given in diagnosing the disease. IBID. 14

**Duelling**

- Illegality of. 450

**Dying declaration***Admissibility.*

1. On an indictment for murder a dying declaration of the deceased that he was shot in the body and was "going fast," indicates a settled and hopeless consciousness that he was in a dying state and his declaration is admissible in evidence. R. v. DAVIDSON. (N.S.) 351
2. In deciding the preliminary question as to whether the deceased was under a sense of impending death, so as to allow evidence of his dying declaration to be admitted, the trial judge must have regard to the whole of the surrounding circumstances including the nature and extent of the gun charge and the immediate result of the wound. IBID. 351
3. A dying declaration is not admissible if there existed in the mind of the party making it a hope of recovery or a hope of escape from almost immediate death; but if there is a firm, settled expectation by deceased of impending death and no hope of recovery remaining in his mind, the declaration is admissible, although such belief was the result of panic and not well founded. IBID. 351
4. Impeachment and contradiction of. 363
5. Limitations and requisites on admissibility in evidence. 362

**Ejusdem Generis***Construction of statute.*

1. Generic words following specific words are not restricted in their primary meaning because preceded by the word "other." R. v. WALSH. (ONT.) 109
2. Sec. 729 Cr. Code authorizing the "taking of the verdict of the jury or other proceedings of the court" on a Sunday is to be applied only to matters before a jury. R. v. CAVELIER. (MAN.) 134
3. Doctrine of. 112

**Election***For jury trial—Sufficiency of.*

1. The prisoner's reply upon arraignment before a county judge under Cr. Code 766 and 767 that "for the present" he elected to be tried by a jury is a sufficient election. R. v. BALLARD. (ONT.) 96

*For jury trial—Change of.*

2. A prisoner arraigned before a county judge under Criminal Code, secs. 766 and 767, and who thereupon demands a trial by jury and elects not to be tried forthwith by such judge without a jury, has no absolute right after remand to goal to change the election so made. IBID. 96
3. For trial without jury. 300

**Enforcing payment***Fine—Summary conviction—Cr. Code 872 (b).*

1. Upon conviction and fine for keeping a bawdy house the powers of a magistrate for enforcing payment of the fine are limited to directing imprisonment for a period not exceeding three months under Cr. Code, sec. 872 (b), although he might impose imprisonment for six months in the first instance instead of a fine. R. v. STAFFORD. (N.S.) 239

**Error**

- See COMMENT.  
See NEW TRIAL.  
See WRIT OF ERROR.

**Evasion**

- Of statute by device. 31, 317

**Evidence**

1. Admissibility of former deposition of accused. 221
2. Admissibility of secondary evidence of contents of books, originals of which were not produced pursuant to counsel's undertaking. 487, 500
3. Admissions to police officer as. 398

**Evidence—Continued.***By-law—Proof of.*

4. Proof of a municipal by-law cannot be made by affidavit on a prosecution for an offence thereunder. *R. v. BANKS.* (N.W.T.) 370  
 5. Cause of death, proof of abortion committed. 246

*Confiscation—Civil action to controvert.*

6. In an action to recover from the constable and the clerk of the peace moneys seized in a common gaming house under confiscation proceedings, the rules of evidence in force in the province for civil matters will apply and not the Canada Evidence Act. *O'NEIL v. ATTORNEY-GENERAL.* (CAN.) 303

*Conspiracy—Acts of co-conspirator.*

7. In a charge of conspiracy when the existence of the common design on the part of the defendants has been proved, evidence is then properly receivable as against both of what was said or done by either in furtherance of the common design. *R. v. CONNOLLY.* (ONT.) 468

*Conspiracy—Acts of a co-conspirator not charged.*

8. In a charge of conspiracy evidence is admissible of what was said or done in furtherance of the common design by a conspirator not charged, as against those who are charged, after proof of the existence of the common design on the part of the defendants with such conspirator. *IBID.* 468

*Conspiracy—Proof of.*

9. In a charge of conspiracy, it is not necessary to prove that the parties came together and actually agreed in terms to carry out their common design ; but the jury may group the detached acts of the parties severally, and view them as indicating a concerted purpose on the part of all as proof of the alleged conspiracy. *IBID.* 468

*Coroner's Court—Witness—Privilege.*

10. A witness before a Coroner's Court is compelled under the Canada Evidence Act to answer incriminating questions, such court being a criminal court and a court of record, and proceedings before the coroner are within the jurisdiction of the Federal Parliament, although no one is there charged with the offence of causing the death of the deceased. *R. v. HAMMOND.* (ONT.) 373  
 11. Corroboration in seduction case. 6

*Criminating answers—Failure to object to answer.*

12. Under the Canada Evidence Act, 56 Vic., c. 31, s. 5, prior to the amendment of 1898, it was not necessary first to object to answer an incriminating question, in order to entitle the witness to the benefit of the provision making the incriminating

**Evidence—Continued.**

answer inadmissible on any subsequent criminal proceedings against him, other than for perjury. *R. v. HAMMOND.* (ONT.) 373

*Cross-examination—Irrelevant question—Rebuttal.*

13. The answer of a prisoner examined as a witness on his own behalf to a question in cross-examination foreign to the issue, must be accepted as final; and the prosecution is not entitled to call rebuttal evidence to contradict it for the mere purpose of impeaching the credit of the witness. *R. v. LAPIERRE.*

(QUE.) 413

*Cross-examination.*

14. On irrelevant question, no rebuttal of answer to impeach credit.

413

*Cruelty to child—Acts of cruelty to others.*

15. Upon a charge of causing grievous bodily harm to a child under defendants' care with intent to bring about the child's death, evidence of acts of cruelty by defendants to another child also in defendants' care are irrelevant to the case and inadmissible. *R. v. LAPIERRE.*

(QUE.) 413

*Discovery of new evidence—New trial.*

16. A new trial granted by the Minister of Justice under Code sec. 748, on the discovery of new evidence. *R. v. STERNMAN.*

(ONT.) 1

*Dying declaration—Belief of impending death.*

17. On an indictment for murder a dying declaration of the deceased that he was shot in the body and was "going fast," indicates a settled and hopeless consciousness that he was in a dying state and his declaration is admissible in evidence. *R. v. DAVIDSON.*

(N.S.) 351

18. In deciding the preliminary question as to whether the deceased was under a sense of impending death, so as to allow evidence of his dying declaration to be admitted, the trial judge must have regard to the whole of the surrounding circumstances including the nature and extent of the gun charge and the immediate result of the wound. *IBID.*

351

19. Expert testimony, calculation of results by engineer.

488

*Evidence—Extradition—Political offence.*

20. On an application for the extradition of a fugitive, evidence to show that the offence charged is a political one, or that it is not an extradition crime, should be allowed; and if proof be made to that effect the prisoner must be discharged. *RE LEVI.*

(QUE.) 74

21. Failure to provide necessities, lawful excuse.

28

**Evidence—Continued.***Former deposition—Compulsory answer in civil proceedings.*

22. The Canada Evidence Act, sec. 5, does not apply to exclude evidence given by the accused in a civil proceeding under the jurisdiction of a Provincial Legislature from being used in evidence against him in a subsequent criminal proceeding, and the same rule will apply although the examination in the civil proceeding was compulsory. *R. v. DOUGLAS.* (MAN.) 221

*Former deposition—Cross-examination upon.*

23. Although a summary only of the evidence and not the precise words of a witness have been taken down by the Coroner at an inquest without being read over or signed by the witness, the latter may in such case be cross-examined as to any material statements made by him at the inquest, and witnesses may be called to show that he then made a different and contradictory statement. *R. v. CIARLO.* (QUE.) 157

*Former deposition—Incriminating questions—Failure to object in former civil proceedings.*

24. If a party entitled in civil proceedings to be excused from answering questions on the ground that the answers might tend to criminate him does not object to answer, his evidence is deemed to be voluntary. *R. v. DOUGLAS.* (MAN.) 221

*Former deposition—Record of, after translation—Admissibility.*

25. Depositions of a witness speaking in French taken down by the translator in English at a preliminary enquiry but not read over and explained to the witness or signed by him are not admissible to contradict his testimony on a subsequent proceeding, but the witness may be cross-examined as to material statements then made, and witnesses called to show a contradiction with his former testimony. *R. v. CIARLO.* (QUE.) 157

*Impeaching credit—Rebuttal to contradict answer.*

26. The answer of a prisoner examined as a witness on his own behalf to a question in cross-examination foreign to the issue, must be accepted as final; and the prosecution is not entitled to call rebuttal evidence to contradict it for the mere purpose of impeaching the credit of the witness. *R. v. LAPIERRE.* (QUE.) 413

27. In criminal conspiracy. 262

*Incriminating questions—Privilege.*

28. The excuse from answering questions which may tend to

**Evidence—Continued.**

criminate himself is only removed by the Canada Evidence Act, secs. 2 and 5, where the witness is being examined in a criminal proceeding, or in some civil proceeding or matter respecting which the Dominion Parliament has authority to determine the admissibility of the evidence. *R. v. DOUGLAS.*

(MAN.) 221

29. If a party entitled in civil proceedings to be excused from answering questions on the ground that the answers might tend to incriminate him does not object to answer, his evidence is deemed to be voluntary. *IBID.*

221

30. Inference where common fund for two business establishments.

312

*Intent—Inference from acts and conduct.*

31. For the purpose of proving "intent to steal" it is sufficient if an inference of such intent is deducible for the acts and conduct of the prisoner as shewn by the evidence. *R. v. GIBBONS.*

(MAN.) 340

*Motive—Res gestæ—Life insurance.*

32. To prove the alleged motive of securing life insurance moneys, in a trial for murder, evidence is properly admissible, as a part of the *res gestæ* of all applications for insurance made practically at the same time and forming parts of one transaction, although some of the applications were refused and no insurance effected thereupon. *R. v. HAMMOND.*

(ONT.) 373

33. Objection to answer incriminating questions under Can. Act of 1898.

397

34. Of identity in extradition cases.

74, 80

*Of identity—Sufficiency of.*

35. Evidence given by the official stenographer to the effect that the prisoner resembled the party of same name as prisoner, whose depositions he had taken, and that he believed him to be the same man, but could not sufficiently remember to swear positively to his identity, is properly submitted to a jury. *R. v. DOUGLAS.*

(MAN.) 221

36. Of intent.

1

37. Of persuasion in abduction case.

284

38. Of previous conviction

13

39. Of prior conviction, identity must be proved apart from certificate.

510, 513

40. Evidence of similar subsequent acts of accused.

9

41. Onus of proving want of reasonable and probable cause.

48

42. Personal knowledge by magistrate of identity of accused with person previously convicted insufficient in charge of second offence.

510

**Evidence—Continued.**

43. Political offence in extradition cases. 74  
 44. Presumption of law as to "de facto" officer. 315

*Summarised statement—Admissibility.*

45. Notes of evidence taken by the coroner at an inquest which do not contain the precise expressions of the witness, but a summary only of the evidence, are not admissible in contradiction of the witness' testimony in a subsequent proceeding unless signed by the witness, or unless read over to and acquiesced in by him. *R. v. CIARLO.* (QUE.) 157

*Trade mark offence—Onus.*

46. On a charge of falsely applying a trade mark the onus of proving that the assent of the proprietor of the trade mark has not been given is upon the prosecution. *R. v. S. HOWARTH.* (ONT.) 243  
 47. Trade mark, proprietor's assent. 73, 243  
 48. Trade mark, similarity of. 68  
 49. What is evidence "implicating" accused. 6

**Exception***In description of offence—Negating.*

1. The existence of an exception nominated in the *description* of an offence created by statute must be negated in order to maintain the charge. *R. v. STRAUSS.* (B.C.) 103  
 2. Note as to. 108

*Onus of proof.*

3. If a statute creates an offence in general terms with an exception by way of proviso in favour of certain persons or circumstances, the onus is on the accused to plead and prove himself within the proviso. *R. v. STRAUSS.* (B.C.) 103

**Excessive Penalty***Conviction—Term of imprisonment.*

1. A conviction awarding ninety days' imprisonment as an alternative punishment on non-payment of a fine where the statute authorized three months' imprisonment is bad, as ninety days may possibly be more than three months. *R. v. GAVIN.* (N.S.) 59

**Excuse**

See EVIDENCE.

*Incriminating questions—Privilege.*

1. The excuse from answering questions which may tend to criminate himself is only removed by the Canada Evidence Act, secs. 2 and 5, where the witness is being examined in a criminal proceeding or in some civil proceeding or matter respecting which the Dominion Parliament has authority to determine the admissibility of the evidence. *R. v. DOUGLAS.* (MAN.) 221

**"Excused"**

Meaning of.

381

**Expert Testimony**

See EVIDENCE.

**Extradition***After conviction—Evidence.*

1. Under the Ashburton treaty between Great Britain and the United States of America in 1842, and the convention of 1890, to obtain the extradition of a fugitive charged with the commission of an extradition crime, the same evidence must be given as would justify his committal for trial if the crime had been committed in Canada, and to obtain the extradition of a fugitive who has been convicted of an extradition crime, a duly authenticated copy of the record must be produced and proof of the fugitive's identity must be made. *RE LEVI. (QUE.)* 74

2. In the case of a fugitive who has been convicted, the judge does not examine the evidence given at his trial and must not revise the verdict of the jury; his duty is to see if the offence is an extradition crime, if the conviction after a regular trial has been duly proved, and if the prisoner has been identified. *IBID.* 74

*Exception of political offence—Evidence.*

3. On an application for the extradition of a fugitive, evidence to show that the offence charged is a political one, or that it is not an extradition crime, should be allowed; and if proof be made to that effect the prisoner must be discharged. *IBID.* 74

*Habeas corpus—Review on.*

4. On a writ of habeas corpus in an extradition case the judge must see, in the first place, whether the offence charged is or is not of a political character, or whether it is or is not an extradition crime, and then whether the proceedings are regular and justify the prisoner's committal for surrender. *IBID.* 74

**Extra-territorial acts***Abduction—Persuasion to leave.*

1. If the persuasion to leave and to remain away operated wholly in the foreign country, there is no jurisdiction to convict in Canada, as persuasion is a necessary element in such cases of abduction. *R. v. BLYTHE. (B.C.)* 263

*Conspiracy—Overt act.*

2. Any overt act of conspiracy is to be viewed as a renewal or continuation of the original agreement made by all of the conspirators, and, if done in another jurisdiction than that in which



**Extra-territorial acts—Continued.**

the original concerted purpose was formed, jurisdiction will then attach to authorize the trial of the charge in such other jurisdiction. *R. v. CONNOLLY.* (ONT.) 468

*Domicile—Effect of, on jurisdiction.*

3. A British subject domiciled in Canada, and only temporarily absent, continues to owe to Her Majesty in relation to her government of Canada an obligation to refrain from the completion, whilst absent without any *animus manendi*, of a prohibited act, a material part of which is committed by him in Canada. *RE BIGAMY SECTIONS OF CODE.* (CAN.) 172

4. Locality of crime, note as to jurisdiction. 284

**Facts**

Amended conviction must conform to. 219

**Failure**

To object to irregularity in trial. 466

**Falsely applying trade-mark***Evidence—Onus of proof.*

1. Sec. 710, Criminal Code, applies only to cases of forgery of a trade mark and not to cases of "falsely applying," so as to shift the onus to the defendant of proving the proprietor's assent. *R. v. S. HOWARTH.* (ONT.) 243

**False pretences**

1. Extra-territorial act, jurisdiction. 285
2. Publishing false statement of company's affairs. 551

**False return**

Liability of magistrate for. 219

**False Statement***Of company's affairs.*

1. A charge against the president of an incorporated trading company of having made and published a statement of its affairs, knowing the same to be false and with intent to defraud, may be tried either in the province in which the statement was despatched by mail to the party defrauded, or in the province in which it is received by mail at the address to which the defendant directed it, and a magistrate of the district to which the letter is addressed, and in which it is received by the defrauded party, may take the information in such a case under Cr. Code sec. 554 (b), and compel the attendance of the accused by a warrant executed in the province from which the letter was despatched. *R. v. GILLESPIE.* (QUE.) 551

**Felony**

Effect of abolition of distinction between misdemeanor and felony on statute referring to the latter. 169

**Findings***Of trial judge—Review.*

1. When the trial takes place by consent without a jury the finding by the trial judge as to intent should not be interfered with unless there is no evidence thereon which could properly be submitted to a jury. *R. v. GIBBONS.* (MAN.) 340

*Of magistrate—Review.*

2. Findings of fact by the magistrate are not open to review on motion to quash conviction in certiorari proceedings, if there was evidence from which he might draw the conclusion he did. *EX PARTE COULSON.* (N.B.) 31

**Fine***Enforcement of Cr. Code 208.*

1. Cr. Code sec. 208 only applies to authorize six months' imprisonment when imposed as the substantive punishment for keeping a bawdy house, and not as a means of enforcing payment of a fine. *R. v. STAFFORD.* (N.S.) 239

*Enforcement of—Cr. Code 788.*

2. Sec. 788, Cr. Code, only applies to authorize six months' imprisonment for keeping a bawdy house in default of payment of a fine when fine and imprisonment are conjointly imposed in the first instance. *R. v. STAFFORD.* (N.S.) 239

3. Fixed appropriation to magistrate out of fines not a disqualification. 410

**“Foregoing”**

Meaning of. 152

**Foreign country**

See EXTRA-TERRITORIAL ACTS.

**Foreign language**

Record of depositions taken down after translation only, effect of. 157

**Forfeiture***Adjudication in criminal proceeding—Constitutionality.*

1. A statutory provision by the Parliament of Canada, purporting to authorize a magistrate to adjudge forfeiture to the Crown of moneys, etc., found in a common gaming house, and declaring the keeping of a gaming house a criminal offence, and imposing punishment therefor, is not ultra vires, and the judgment of confiscation is not an interference with “property and

**Forfeiture—Continued.**

civil rights," the jurisdiction in regard to which belongs to the provinces, although the party claiming the money was not a party to the proceedings in which the confiscation was decreed.  
O'NEIL v. ATTORNEY-GENERAL. (CAN.) 303

**Forgery**

Of trade mark. 68, 243

**Form of marriage**

Statutory definition of. 173

**Former Deposition**

See EVIDENCE.

1. Admissibility to contradict testimony. 157, 160
2. Of prisoner as evidence. 228

**Fraud**

See FALSE PRETENCES.

*Conspiracy to defraud.*

1. Conspiracy to defraud is indictable although the object was to commit a civil wrong, and although if carried out the act agreed upon would not constitute a crime. R. v. DEFRIES. (ONT.) 207

**French language***Depositions in French recorded in English.*

1. Depositions of a witness speaking in French taken down by the translator in English at a preliminary inquiry but not read over and explained to the witness or signed by him are not admissible to contradict his testimony on a subsequent proceeding, but the witness may be cross-examined as to material statements then made, and witnesses called to show a contradiction with his former testimony. R. v. CIARLO. (QUE.) 157

**Further detention**

1. Sec. 752 of the Cr. Code, providing for further detention, and enquiries in habeas corpus proceedings is to be applied only to cases where the *habeas corpus* issues in the same province in which the warrant of arrest or of commitment is made. R. v. DEFRIES. (ONT.) 207

**Gain**

Practising medicine for, proof of. 14

**Games**

Assault by wilful infringement of rules of game and by consequent injury. 450

**Game Protection***Intent to export.*

3. The generality of the prohibition contained in the Game Protection Act (B. C.), 1895 (sec. 7), against purchasers having in possession with intent to export, causing to be exported, etc., game, etc., is not to be limited by inference to game killed within the Province. *R. v. STRAUSS.* (B.C.) 103

**Gaming**

See GAMING HOUSE.

See LOCALITY OF CRIME.

Not illegal at common law.

293

**Gaming House**

See GAMING.

1. Confiscation of money found in.

303

*Disorderly house—Offence of keeping—Cr. Code 783(f).*

2. Cr. Code, sec. 783(f), enacting that whenever any person is charged before a magistrate with keeping or being an inmate or habitual frequenter of any disorderly house, house of ill-fame or bawdy house, the magistrate may hear and determine the charge in a summary way, does not apply to the offence of keeping a common gaming house. *R. v. FRANCE.* (QUE.) 321

*Forfeiture—Collateral attack.*

3. A judgment of forfeiture in criminal proceedings of money found in a common gaming house is not subject to collateral attack in a civil action brought for the recovery of the moneys. *O'NEIL v. ATTORNEY-GENERAL.* (CAN.) 303
4. No jurisdiction in Judge of the Sessions of the Peace to summarily try charge of keeping. 321
5. Nuisance at common law. 293

*Seizure of effects in—Cr. Code 575.*

6. For the purpose of seizing money, etc., found in a common gaming house under a statute giving authority to the "chief constable or deputy chief constable," it is not requisite that the officer acting should bear the exact title given in the statute, and it is sufficient if his functions and duties are such as to bring him within the designation there used. *O'NEIL v. ATTORNEY-GENERAL.* (CAN.) 303

**General Sessions**

1. The proceedings for enforcement of an order for costs provided by Cr. Code, sec. 898, apply only to costs dealt with by a Court of General Sessions on affirming or quashing a conviction or order, on appeal to that court. *R. v. GRAHAM.* (ONT.) 405

**Generic Words**

Construction of, in statute.

109, 112, 321

**Gift***Disposal of liquor by licensee—Prohibited hours.*

1. Under the Ontario Liquor License Act the licensee cannot lawfully give away liquor on the licensed premises on Sunday or other prohibited time for "sale or other disposal" of liquors, although the gift be made privately to a friend and in a private room. *R. v. WALSH.* (ONT.) 109

**Government Referred Case**

Reference of, to Supreme Court of Canada.

172, 203

**Grand Jury***Duties of foreman of—Cr. Code 645.*

1. The provisions of the Criminal Code, sec. 645, requiring the foreman of the Grand Jury to initial upon the bill of indictment the names of witnesses sworn is directory only and not imperative. *R. v. BUCHANAN.* (MAN.) 442
2. Question of unsworn evidence before. 444

**Guests***Liquor License Law (B.C.)*

1. Under a statute prohibiting during certain hours the sale of liquor by licensees and providing by way of exception that its provisions shall not apply to restaurant keepers supplying liquor to their guests with meals, a conviction is proper if the supplying of food was used merely as an excuse to enable the licensee to supply liquor. *R. v. SAUER.* (B.C.) 317

**Habeas Corpus**

1. Act of 1866, 29-30 Vict. (Can.) 455
2. Affidavit evidence not admissible to controvert jurisdiction shown on warrant of arrest returned under. 207
3. After committal for trial, duty of judge upon. 551

*Commitment by magistrate—Review.*

4. The duty of a judge under a writ of habeas corpus is to examine whether the committing magistrate has jurisdiction, whether the committal is legal, and whether any crime known to the law is alleged to have been committed, but not to enquire into or revise the magistrate's decision as regards its propriety or impropriety on the merits. *R. v. GILLESPIE.* (QUE.) 551

*County Judge's Criminal Court—Review.*

5. The County Judge's Criminal Court is not an inferior Court subject to review upon habeas corpus of its decisions and proceedings. *R. v. BURKE.* (N.S.) 539

**Habeas Corpus—Continued.***Court of Record—Review.*

6. Habeas Corpus proceedings do not lie to inquire into the validity of a conviction made at a County Judge's Criminal Court as the latter is a court of record. *R. v. MURRAY.* (ONT.) 452

*Detention for further enquiries—Cr. Code 752.*

7. Cr. Code, sec. 752, providing for further detention of the accused pending any further proceedings or enquiries directed, is to be applied only to cases where the habeas corpus issues in the same province in which the warrant of arrest or of commitment is made. *R. v. DEFRIES.* (ONT.) 207
8. Discharge where conviction by "de facto" judge. 528
9. Enlargement of proceedings to allow return of fresh warrant. 220

*Evidence—Proof of a fact extrinsic to the return.*

10. Proof by affidavit is admissible in habeas corpus proceedings to show that the commitment took place on a Sunday, as proving an extrinsic fact in confession and avoidance of, but not contradicting the return. *R. v. CAVELIER.* (MAN.) 134
11. Form of return, by constable with warrant of arrest. 209
12. Form of return by jailer. 540
13. Limitation of right as regards commitment of County Judge's Criminal Court. 546
14. Nova Scotia Act. 539
15. Ontario Act, how far valid. 211, 213
16. Ontario Act (R.S.O. 1897, c. 83.) 455
17. Ontario legislation regarding. 207, 211, 213, 455
18. Quebec Act of, application to party admitted to bail. 169

*Quebec Act of—Construction as to felonies.*

19. A provincial statute prior to Confederation, providing for the discharge from imprisonment in default of an indictment of an accused person committed for a "felony" will apply equally to cases which were misdemeanors before the abolition by the Criminal Code of Canada of the distinction between felony and misdemeanor. *R. v. H. B. CAMERON.* (QUE.) 169
20. Return of amended conviction. 217, 219
21. Return of fresh warrant of commitment where first disclosed no offence. 365

*Return—Necessities of.*

22. Where sentence has been passed by a Court having general jurisdiction of the case such as the County Judge's Criminal Court has in cases of theft, and the prisoner is detained in custody thereunder, the authority of the Court to pass the sentence

**Habeas Corpus—Continued.**

need not be set out by the jailer upon the return to a writ of habeas corpus. *R. v. BURKE.* (N.S.) 539

23. If the return is of a warrant of commitment by the County Judge's Criminal Court for theft which however does not specify such facts as would show on its face that the theft was of such a nature as to give jurisdiction to the County Judge's Criminal Court to impose the imprisonment stated, still the prisoner cannot be discharged upon habeas corpus. *IBID.* 539

**High Constable***Appointment of deputy.*

1. A high constable, having a commission as such from the Crown and not exercising a delegated authority, can legally appoint a deputy to act during his temporary absence. *O'NEIL v. ATTORNEY-GENERAL.* (CAN.) 303

**Holiday***Proceedings by magistrate on—Preliminary investigation—Invalidity.*

1. A preliminary inquiry held by a magistrate and a commitment for trial made on a statutory holiday are bad in law. *R. v. MURRAY.* (ONT.) 452

*Invalidity of commitment—Subsequent plea to charge.*

2. If after commitment for trial illegally made by a magistrate on a statutory holiday the accused elects to be tried at the County Judge's Criminal Court and pleads there to the charge and is convicted, the conviction is not invalidated because of the invalidity of the commitment for trial. *IBID.* 452

**Hope of Recovery***Dying declaration—Effect upon.*

1. The fact that the person making a dying declaration subsequently entertains a hope of recovery is irrelevant, except in so far as it may be evidence of his state of mind at the time of the declaration. *R. v. DAVIDSON.* (N.S.) 351

**Husband and Wife***Failure to provide necessities—Cr. Code 210.*

1. Upon a prosecution under the Criminal Code, 1892, sec. 210 (2) for omitting without lawful excuse to provide necessities for a wife, evidence is admissible, as tending to show a lawful excuse, of an agreement between husband and wife at time of marriage that she should be supported as before the marriage and not by him until he could earn sufficient means for the maintenance of both; and such evidence is admissible although it may not, if established, furnish an answer to the charge. *R. v. ROBINSON.* (ONT.) 28

**Husband and Wife—Continued.**

2. Married person leaving Canada with intent to go through a form of marriage elsewhere, liability on carrying out such intent.

172

**Identity***Evidence—Sufficiency of.*

1. Evidence given by the official stenographer to the effect that the prisoner resembled the party of the same name as prisoner, whose depositions he had taken, and that he believed him to be the same man, but could not sufficiently remember to swear positively to his identity, is properly submitted to a jury. *R. v. DOUGLAS.*

(MAN.) 221

*Extradition—Convicted fugitive.*

2. Under the Ashburton treaty between Great Britain and the United States of America in 1842, and the convention of 1890, to obtain the extradition of a fugitive charged with the commission of an extradition crime, the same evidence must be given as would justify his committal for trial if the crime had been committed in Canada, and to obtain the extradition of a fugitive who has been convicted of an extradition crime, a duly authenticated copy of the record must be produced and proof of the fugitive's identity must be made. *RE LEVI.*

(QUE.) 74

3. Note as to proof of.

230

4. Of defendant with party previously convicted, proof of. 513, 526

*Of interdicted person—Liquor License Act (N.B.)*

5. Knowledge by the liquor dealer of the identity of the person supplied with liquor with the person named in the notice given in reference to an interdicted person under the Liquor License Act, 1896, (N.B.) Sec. 110 is not necessary in order to constitute the offence specified in said section. *R. v. DIAS.*

(N.B.) 534

6. Proof of, as to prior conviction.

13, 502

7. Proof of, in extradition cases.

74, 80

*Second offence—Magistrate's knowledge of prior conviction.*

8. The magistrate can act only upon evidence adduced and not upon his own personal knowledge as to the identity of the defendant with the person of that name mentioned in a certificate of prior conviction. *R. v. HERRELL.*

(MAN.) 502

*Second offence—Manitoba Liquor License Act.*

9. In the absence of an admission by the accused of the fact of previous conviction, it is essential under the Manitoba Liquor License Act that evidence apart from a certificate should be given of the identity of the accused with the person formerly convicted. *IBID.*

502



**Impeachment**

Of dying declaration. 363

**Implicating**

What is "implicating" evidence in corroboration. 6

**Imprisonment**

• See COMMITMENT.

*A species of "penalty."*

1. The word "penalty," although generally applied to pecuniary punishment, as by fine, includes also punishment by imprisonment. R. v. GAVIN. (N.S.) 59

*Bail—Constructive imprisonment.*

2. A person admitted to bail is in custody and is constructively in gaol, so as to entitle him to the benefit of a statute providing for the discharge of the accused from imprisonment in default of indictment within a limited time. R. v. H. B. CAMERON. (QUE.) 169

*Enforcement of fine—Cr. Code 788.*

3. Sec. 788 Cr. Code, only applies to authorize six months' imprisonment for keeping a bawdy house in default of payment of a fine when fine and imprisonment are conjointly imposed in the first instance. R. v. STAFFORD. (N.S.) 239

*Possible excess in term of.*

4. A conviction awarding ninety days' imprisonment as an alternative punishment on non-payment of a fine where the statute authorized three months' imprisonment is bad, as ninety days may possibly be more than three months. R. v. GAVIN. (N.S.) 59

*Warrant of commitment—Necessities of.*

5. The precept of a warrant of commitment must conform strictly to the directions of the statute which authorizes an incarceration, with respect to the conditions upon which a prisoner can obtain his discharge before the expiration of the term to which he has been condemned. EX PARTE LON KAI LONG. (QUE.) 120

**Inadvertence***Plea to indictment—Withdrawal.*

1. Consent may be given by the Crown to the withdrawal of plea to the indictment, upon a statement by counsel for the accused that the plea was made inadvertently. R. v. LAWRENCE. (B.C.) 295

**Inconvenience***Magistrate's Court—Place of holding.*

1. The fixing of an inconvenient place for hearing is improper, but within the jurisdiction of the Justice of the Peace, and therefore not reviewable on motion for prohibition. R. v. CHIPMAN. (B.C.) 81

**Indians**

Confession by, to Government Agent, as evidence. 401

**Indictable Offence***Bar of civil action—Cr. Code 866.*

1. Sec. 866, Cr. Code, applies to bar the civil action, only where the charge is triable summarily under sec. 864 without regard to the consent of the accused, and does not have that effect where the charge is under sec. 262 for the indictable offence of assault causing actual bodily harm. *NEVILLS v. BALLARD.* (ONT.) 434

*Preliminary enquiry—Powers of magistrate on.*

2. Magistrates conducting a preliminary enquiry in respect of an indictable offence may not on its conclusion convict of a lesser offence over which they have summary jurisdiction, although proved by the evidence adduced, if no complaint was laid before them nor the accused called upon to defend in respect of such lesser offence. *R. v. MINES.* (ONT.) 217

**Indictment***Criminal conspiracy.*

1. One conspirator may be indicted and convicted without joining the others, although living and within the jurisdiction. *R. v. FRAWLEY.* (ONT.) 253
2. Decision on motion to quash not proper subject of a "reserved case." 456
3. Delivery of particulars as an amendment of. 486
4. Failure of foreman of Grand Jury to initial names of witnesses upon. 442
5. Form of, in charge of conspiracy to defraud. 215, 216

*Initialing names of witnesses.*

6. An indictment should not be quashed because of the omission of the foreman to initial the names of the witnesses sworn before the Grand Jury. *R. v. BUCHANAN.* (MAN.) 442

*Multifariousness—Withdrawal in part.*

7. An indictment multifarious in that it combines a charge of a failure to provide necessities for a child under sixteen under Cr. Code 210, 215, with a charge of an attempt to murder the child (Cr. Code 232) and to which indictment the prisoners pleaded is sufficient upon which to base a conviction thereon for the latter offence without a formal amendment of the indictment, where the presiding judge has withdrawn from the jury that portion of the charge based upon secs. 210 and 215. *R. v. LAPIERRE.* (QUE.) 413

*Particulars.*

8. The absence or the insufficiency of particulars does not

**Indictment—Continued.**

vitiates an indictment nor an information; but if it be made to appear that there is a reasonable necessity for more specific information, the court or magistrate may, on application of the accused person, order that further particulars be given, but such an order is altogether within the judicial discretion of the judge or magistrate. *R. v. FRANCE.* (QUE.) 321

**Informality**

No certiorari upon mere informality without substantial defect. 219

**Informant**

*Status upon certiorari.*

1. The informant in certiorari proceedings in criminal matters is not a party to the record although his name appears and although he is under liability for costs and has given a recognition for same. *R. v. FITZGERALD.* (ONT.) 420

**Information**

*Amendment of, in absence of accused.*

1. An amendment of a charge of selling liquor contrary to the Canada Temperance Act to a charge of keeping liquor for sale cannot be made if the accused does not appear at the trial. *EX PARTE DOHERTY.* (N.B.) 84

*Description of offence in.*

2. An information should give a concise and legal description of the offence charged, and should contain the same certainty as an indictment, and the description of the charge must include every ingredient required by the statute to constitute the offence, and the statement of the offence may be in the words of the enactment describing it or declaring the transactions charged to be an indictable offence. *R. v. FRANCE.* (QUE.) 321

3. For publishing false statement of company's affairs, form of. 552

**Intent**

*Demand with menaces—Intent to steal.*

1. For the purpose of proving "intent to steal," it is sufficient if an inference of such intent is deducible from the acts and conduct of the prisoner as shown by the evidence. *R. v. GIBBONS.* (MAN.) 340

*Demand with menaces—Intent—Question for jury.*

2. The question of "intent to steal" in a charge of demanding with menaces and with such intent is one entirely for the jury, and cannot be determined as a question of law by the judge. *IBID.* 340

*Demand with menaces—Threat of liquor prosecution.*

3. A demand of money from a hotel keeper under threat of

**Intent—Continued.**

prosecution for selling intoxicating liquor in prohibited hours contrary to a Liquor License statute if the demand be not complied with may constitute the offence under Cr. Code 404 of demanding money with menaces, "with intent to steal the same." *IBID.*

4. Evidence of intent to steal. 340  
 5. In criminal conspiracy. 262

**Poisoning—Evidence.**

6. Evidence of similar symptoms of arsenical poisoning attending the death of prisoner's former husband following administration to him of food prepared by the prisoner is evidence to shew intent as regards a charge of arsenical poisoning of a second husband on evidence of arsenical poisoning of the latter, and of similar preparation of food by the prisoner and her attendance on her husband during his illness. *R. v. STERNAMAN.* (ONT.) 1

**Proof of—Poisoning.**

7. Evidence is admissible on a charge of murder by poisoning to shew the administration of the same kind of poison by the prisoner to another person, as proving intent. *R. v. STERNAMAN.* (ONT.) 1

**To injure—Carrying firearms.**

8. A conviction for "procuring" a pistol with intent unlawfully to do injury to another person, is not to be held a sufficient conviction for "having on his person a pistol, etc.," and is bad as not disclosing an offence known to the law. *R. v. MINES.* (ONT.) 217

**Interdiction, Notice of**

1. A printed notice by a License Inspector in his own name prohibiting the sale of liquor to a particular person under the Liquor License Act, 1896, (N.B.) sec. 110, is sufficient, and it is not necessary that he should serve the identical notice received from the relative of the party to be interdicted, nor that the notice should set forth all that is essential to be proved for the purpose of sustaining a conviction. *R. v. DIAS.* (N.B.) 534

**Interlocutory Order**

In certiorari proceedings, appeal from. 405

**Interpretation**

1. Canada Interpretation Act, s. 7 (4). 442  
 2. Canada Interpretation Act, s. 7 (26). 453

**Generic words.**

3. It is immaterial whether the generic term precedes or follows

**Interpretation—Continued.**

the specific terms which are used ; in either case the general word must take its meaning, and be presumed to embrace only things or persons of the kind designated in the specific words.  
R. v. FRANCE.

(QUE.) 321

*Reference to decisions—Origin of statute.*

4. The Canadian law respecting trade-marks being derived from English legislation, reference for its interpretation should be had to English decisions, more especially as the law extends throughout the Dominion, and it is desirable that the jurisprudence should be uniform. R. v. AUTHIER.

(QUE.) 68

**Inter-provincial Proceedings**

1. A court of one province has no jurisdiction to direct an inquiry before a justice or a judge in another province, or the hearing of further evidence under Cr. Code, sec. 752, to controvert the allegation of jurisdiction in a return to a writ of habeas corpus. R. v. DEFRIES.

(ONT.) 207

**Intoxicating Liquors**

See LIQUOR LICENSE.

1. Gift included in "sale or other disposal." 109
2. Illegal sale, second offence. 12
3. Proof of license. 111
4. Sale by club. 31, 39
5. Sale on Sunday, negativing exceptions. 108
6. Unauthorized penalty on conviction for unlawful sale. 59

**Invalidity**

No enlargement of habeas corpus motion to cure invalidity on face of commitment. 220

**Irregularity**

1. In manner of taking depositions, effect of. 157

*In plea.*

2. A plea of justification irregular because it contains matters of mere comment and argument should be rejected from the record, or the illegal averment should be struck out and the defendant allowed to plead anew. R. v. GRENIER. (QUE.) 55
3. In trial proceedings, consent of prisoner as affecting. 465

**Jailer**

Return by, to writ of habeas corpus, form. 540

**Joint Indictment**

See REPLY, RIGHT OF.

**Judge's Charge**

See CHARGE.

**Judge of Sessions**

When no jurisdiction without preliminary investigation by magistrate. 335

**Judgment**

Decision on Government referred case not a. 203

**Judicial functions**

*Certiorari—Municipal resolution.*

1. A town council which has passed a resolution to pay informers, other than the inspector, the costs and a proportion of the fine, when collected in prosecutions under the Canada Temperance Act, does not thereby exercise a judicial function, and the same is not reviewable on certiorari. RE NEW GLASGOW. (N.S.) 22

**Judicial Notice**

1. Of corporation statute law of another province. 551
2. Of statutes of other provinces. 227
3. Of Sundays in matters of date. 140

**Jurisdiction**

*Abusive language—Nova Scotia law.*

1. One magistrate has no jurisdiction to convict on a charge of using abusive language under R. S. Nova Scotia, 5th series, c. 103, and 1889, N. S., c. 36. R. v. MCLEOD. (N.S.) 10

*Certiorari.*

2. Certiorari lies only to inferior tribunals or officers exercising judicial functions, and the act to be reviewed must be judicial in its nature. RE NEW GLASGOW. (N.S.) 22

*Confiscation in criminal proceedings.*

3. A statutory provision by the Parliament of Canada, purporting to authorize a magistrate to adjudge forfeiture to the Crown of moneys, etc., found in a common gaming house, and declaring the keeping of a gaming house a criminal offence, and imposing punishment therefor, is not ultra vires, and the judgment of confiscation is not an interference with "property and civil rights," the jurisdiction in regard to which belongs to the provinces, although the party claiming the money was not a party to the proceedings in which the confiscation was decreed. O'NEIL v. ATTORNEY-GENERAL. (CAN.) 303

*Conspiracy—Overt act—Locality of crime.*

4. Any overt act of conspiracy is to be viewed as a renewal or continuation of the original agreement made by all of the

**Jurisdiction—Continued.**

conspirators, and, if done in another province than that in which the original concerted purpose was formed, jurisdiction will then attach to authorize the trial of the charge in such other province. *R. v. CONNOLLY.* (ONT.) 468

**County Judge's Criminal Court.**

5. The judge of the County Judge's Criminal Court is invested as to proceedings within the jurisdiction of that Court with the like powers as belong to a Superior Court judge. *R. v. BURKE.* (N.S.) 539

6. Court of superior and court of limited statutory jurisdiction distinguished. 539

**Criminal law—B.N.A. Act.**

7. If it appears that provincial legislation deals with public wrongs and imposes penalties in respect thereof for the enforcement of which all citizens should have an equal interest, as distinguished from enactments passed for the protection of a particular class or the regulation of the dealings or business of a certain class, as, for example, between master and servant, such legislation as to public wrongs is within the exclusive jurisdiction of the Dominion Parliament, although similar legislation as applied to various classes only and not to the public generally would be within provincial jurisdiction as dealing with "civil rights." *R. v. HALIFAX ELECTRIC CO.* (N.S.) 424

**De facto judge—Objection.**

8. The failure of a judicial officer to take the oath of allegiance and the oath of office where he has acted as the holder of the office, and has been acknowledged and accepted as the duly qualified incumbent thereof by the public, does not invalidate his judgments in criminal cases where his qualification has not been contested at the time of the trial, and such judgments are valid and binding as having been rendered by a judge *de facto*. *EX PARTE CURRY.* (QUE.) 532

9. If the accused takes objection at the trial to the qualification of the magistrate to act in the case because of his failure to take the oaths of office and of allegiance, public acquiescence in his exercise of judicial functions will not avail to make his adjudication binding, and the accused convicted under Cr. Code 783 under such circumstances is entitled to be released from custody upon habeas corpus. *EX PARTE MAINVILLE.* (QUE.) 528

**Divisional Court, Ontario—Appeal.**

10. An *ex parte* order made by a judge of the High Court of Justice, (Ontario) in a certiorari proceeding in a criminal matter is not subject to review or to be set aside by another judge

**Jurisdiction—Continued.**

sitting in "Weekly Court," but is appealable to a Divisional Court of the High Court sitting *en banc*. R. v. GRAHAM. (ONT.) 405

***Extra-territorial act—Abduction.***

11. If the persuasion to leave and to remain away operated wholly in the foreign country, there is no jurisdiction to convict in Canada of abduction, as persuasion is a necessary element in such cases. R. v. BLYTHE. (B.C.) 263

***Extra-territorial act—Bigamy.***

12. The Parliament of Canada has jurisdiction to constitute the leaving Canada by a British subject resident therein, with an intent to perform elsewhere a prohibited act, an indictable offence upon the act itself being performed. RE BIGAMY SECTIONS OF CODE. (CAN.) 172

13. Extra-territorial act, locality of crime. 284

***Habeas Corpus—Inquiry in another Province.***

14. A court of one province has no jurisdiction under Cr. Code, 752, to direct an inquiry before a justice or a judge in another province, or the hearing of further evidence there to controvert the allegation of jurisdiction. R. v. DEFRIES. (ONT.) 207

***In absence of Police Magistrate.***

15. Notwithstanding a statute that no Justice of the Peace shall act as such for a city except in cases of illness or absence or at the request of the Police Magistrate, a Justice of the Peace may act as regards a charge against such Police Magistrate without the latter's request or his illness or absence, and for the purposes of a case against a Police Magistrate the statute was held not to apply. R. v. CHIPMAN. (B.C.) 81

16. Of judge of sessions where no committal by magistrate. 335

17. Of magistrate, special provisions for British Columbia and Prince Edward Island for summary trial without consent. 231

***Single Judge or Court en banc.***

18. A Provincial Legislature has no jurisdiction to confer upon a single judge, concurrently or otherwise, the power to determine matters arising under the Criminal Code, as to which the full court was formerly the proper forum. R. v. BEALE, (MAN.) 235

**Jury**

1. Election for jury trial. See ELECTION.

***Intent a question for.***

2. The question of "intent to steal" in a charge of demanding with menaces and with such intent is one entirely for the jury, and cannot be determined as a question of law by the judge. R. v. GIBBONS. (MAN.) 340



**Jury—Continued.***Mixed jury.*

3. A prisoner arraigned for trial in Quebec has the right to claim a jury composed for one-half at least of persons speaking his language if French or English. *R. v. SHEEHAN.* (QUE.) 402

**Justification**

See LIBEL.

**Larceny**

See THEFT.

**Laundry**

Municipal by-law for license of in Quebec. 120

**Lawful Care**

Of child, putative father, a person having. 287

**Lawful Excuse**

See NON-SUPPORT.

**Law, question of**

See JURY.

**Legislature**

See CONSTITUTIONAL LAW.

See JURISDICTION.

**Letters**

As acts of persuasion in abduction case. 263

**Libel**

1. Bail as constructive imprisonment. 169
2. Note on plea of justification. 58

*Plea of justification.*

3. A plea of justification to an indictment for defamatory libel must allege that the defamatory matter published is true, and that it was for the public benefit that the alleged libel was published. *R. v. GRENIER.* (QUE.) 55
4. A plea of justification to an indictment for defamatory libel must set forth concisely the particular facts by reason of which its publication was for the public good, but it must not contain the evidence by which it is proposed to prove such facts, nor any statements purely of comment or argument. *IBID.* 55
5. A plea of justification, which embodies a number of letters which it is proposed to use as evidence, and which contains paragraphs consisting merely of comment and argument, is irregular and illegal. *IBID.* 55

**License Inspector**

See LIQUOR LICENSE.

## License Law

1. Intoxicating liquor. See LIQUOR LICENSE.
2. Note on license of "traders."

339

### *Transient traders.*

3. In a prosecution under a by-law for licensing transient traders and other persons who occupy premises in the municipality for temporary periods, it is necessary that the conviction should state that the defendant was a transient trader or other person occupying premises, etc., in the terms of the by-law; and a conviction for "carrying on the business of a sewing machine agent, without first having obtained a license so to do, contrary to the by-law" is not in compliance with such rule, and is therefore bad. R. v. BANKS. (N.W.T.) 370

### *Wholesale trader—Municipal Clauses Act (B.C.)*

4. A manufacturer of clothing who sells the manufactured goods in quantities to be resold by his vendees by wholesale, is a wholesale trader within the meaning of a municipal license law imposing a tax, with penalty for default in payment, upon every person carrying on the business of a "wholesale merchant or trader." R. v. PEARSON. (B.C.) 337

## Life Insurance

- As motive for murder, evidence of.

5, 373

## Liquor License

1. Construction of words "sale and other disposal." 109, 319, 320
2. Exception allowing supply of liquor to guests with their meals. 317
3. Identifying liquor sold with liquor tested. 513

### *Interdicted person—Knowledge of identity.*

4. Knowledge by the liquor dealer of the identity of the person supplied with liquor with the person named in the notice is not necessary in order to constitute the offence specified in section 110 of the Liquor License Act (N.B.) R. v. DIAS. (N.B.) 534
5. Keeping liquor for sale, evidence of proprietary interest. 410

### *License Inspector—Interdicting notice by.*

6. A printed notice by a License Inspector in his own name prohibiting the sale of liquor to a particular person under the Liquor License Act, 1896, (N.B.) sec. 110, is sufficient, and it is not necessary that he should serve the identical notice received from the relative of the party to be interdicted, nor that the notice should set forth all that is essential to be proved for the purpose of sustaining a conviction. R. v. DIAS. (N.B.) 534
7. North-West Territories, jurisdiction of two justices. 132

**Liquor License—Continued.***N.W.T. Ordinance 1891-92.*

8. The Canada Criminal Code applies to prosecutions under the Liquor License Ordinance (N.W.T.), 1891-92, for the enforcement of penalties thereunder. *R. v. WILSON.* (N.W.T.) 132

*Prohibited hours—Exception—British Columbia Act.*

9. Under a statute prohibiting during certain hours the sale of liquor by licensees and providing by way of exception that its provisions shall not apply to restaurant keepers supplying liquor to their guests with meals, a conviction is proper if the supplying of food was used merely as an excuse to enable the licensee to supply liquor. *R. v. SAUER.* (B.C.) 317

*Prohibited hours—Gift of liquor.*

10. Under the Ontario Liquor License Act the licensee cannot lawfully give away liquor on the licensed premises on Sunday or other prohibited time for business, although the gift be made privately to a friend and in a private room. *R. v. WALSH.* (ONT.) 109

11. Proof of license on prosecution. 111

12. Proof of previous conviction. 513

13. Restriction on sales to inebriates. 534, 536

14. Sale to interdicted person after notice an offence, whether or not with knowledge of identity. 534

*Second offence.*

15. Under the Liquor License Act (Manitoba), which provides that upon a prosecution for a second offence thereunder the accused shall, if found guilty and not before, be asked to admit or deny the previous conviction charged, and also provides that proof of the previous conviction may be made by a certificate of the convicting magistrate in case of denial or failure to answer, the accused must be given an opportunity of meeting the charge of prior conviction. *R. v. HERRELL.* (MAN.) 510

*Threat of prosecution—Menaces.*

16. A demand of money from a hotel keeper under threat of prosecution for selling intoxicating liquor in prohibited hours, contrary to a Liquor License statute if the demand be not complied with, may constitute the offence under Cr. Code 404, of demanding money with menaces, "with intent to steal the same." *R. v. GIBBONS.* (MAN.) 340

**Locality of Crime**

See EXTRA-TERRITORIAL ACTS.

*Abduction—Cr. Code 283.*

1. If the persuasion to leave and to remain away operated wholly in the foreign country, there is no jurisdiction to convict

**Locality of Crime—Continued.**

in Canada of abduction, as persuasion is a necessary element in such cases. *R. v. BLYTHE.* (B.C.) 263

2. Bigamy, form of marriage elsewhere, leaving Canada with intent. 172

**Gaming—Cr. Code 196.**

3. Without special statutory provision to that effect the mere use of a gaming instrument in Canada for deciding by chance the winning of stakes placed in a foreign country and payable there, is not gaming so as to make the party operating such instrument liable as the keeper of a common gaming house. (But see 1895 amending Act Can., c. 40, s. 1.)  
*R. v. WETTMAN.* (ONT.) 287

4. Jurisdiction, Note on extra-territorial acts. 284

5. Jurisdiction to constitute extra-territorial acts an offence. 172, 205, 284

6. Locus of crime of conspiracy. 502, 504

7. Place of mailing or place of receipt of letter, continuing offence, concurrent jurisdiction in two provinces. 551

**Magistrate**

See DE FACTO JUDGE.

See DISQUALIFICATION.

See PROTECTION.

**Mailing Letter**

See LOCALITY OF CRIME.

**Malicious Prosecution****Quashing conviction—Death of informant.**

1. Upon quashing a conviction, no cause of action in respect of its illegality survives against the representatives of a deceased informant. *R. v. FITZGERALD.* (ONT.) 420

**Manitoba**

1. Liquor License Act, sections 143-145. 347, 348

151. 520

180. 526

183. 526

200. 525

205. 347

209. 522

210. 522

2. Queen's Bench Act, 1895, rule 1. 235

**Manslaughter**

1. Evidence of attempt to commit abortion—Insufficient post-mortem examination. 246

2. Evidence of cause of death, sufficiency of. 246

**Marriage**

See BIGAMY.

**Materially Misled**

See AMENDMENT.

**Meals**

See LIQUOR LICENSE.

Meaning of in licensing statute.

317

**Medical Act (Ont.)**

1. Particular acts must be specified in conviction for "practising medicine."

114

2. Practising medicine defined.

14, 22

**Menaces***Demand with—Threat of prosecution.*

1. A demand of money from a hotel-keeper under threat of prosecution for selling intoxicating liquor in prohibited hours contrary to a Liquor License statute if the demand be not complied with, may constitute the offence under Cr. Code 404; of demanding money with menaces with intent to steal the same.

R. v. GIBBONS.

(MAN.) 340

2. A threat of prosecution for selling liquor during prohibited hours made to a licensee, who to the knowledge of the prisoner had been previously convicted of an offence under the Liquor License laws and who was therefore liable to a cancellation of his license, as well as to heavy penalties if again convicted, is such a threat as is calculated to do him harm and as would be likely to affect any man in a sound and healthy state of mind, and any such threat is an illegal menace. IBID.

340

*Letter—Reasonable and probable cause.*

3. On a charge of delivering a letter demanding property with menaces and without reasonable and probable cause (Code, sec. 403), the question as to whether the demand was made without reasonable and probable cause is one of fact for a jury.

R. v. COLLINS.

(N.B.) 48

4. The onus of proof is upon the prosecution to prove a want of reasonable and probable cause, in a charge of demanding property with menaces. R. v. COLLINS.

(N.B.) 48

5. Meaning of "menace."

54

6. Question for jury.

54

**Mens Rea**

Doctrine of, considered.

537

**Merchandise Marks**

See TRADE MARK.

**Ministerial Acts**

1. Of Court, valid on Sunday.

140

*Review—Jurisdiction.*

2. The court has no jurisdiction to review or quash a ministerial or legislative act such as the resolution of a town council to pay a portion of the fines collected to informers prosecuting. RE NEW GLASGOW.

(N.S.) 22

**Misdemeanor***Habeas Corpus Act (Que.)—Cr. Code 535.*

1. A provincial statute prior to Confederation, providing for the discharge from imprisonment in default of indictment of any accused person committed for a "felony" will apply equally to cases which were misdemeanors before the abolition by the Criminal Code of Canada of the distinction between felony and misdemeanor. R. v. H. B. CAMERON.

(QUE.) 169

2. When an offence to compound.

316

**Misdirection**

See NEW TRIAL.

**Mistake**

In conviction, objection on account of, to be set forth in Rule nisi.

235

**Mixed Jury**

See LEGISLATURE.

*Right of, in Quebec.*

1. The right to a mixed jury in Quebec conferred by 27-28 Vic. c. 41 (Prov. of Canada) in criminal cases is essentially a matter of criminal procedure, and as such within the legislative authority of the Federal Parliament only, and not within the scope of provincial legislation under the heading of "the constitution and organization of the Courts," B.N.A. Act 92 (14). R. v. SHEEHAN.

(QUE.) 402

*Withdrawal of claim for.*

2. After having claimed a mixed jury and the recording of the order therefor by the court, the prisoner has no absolute right to relinquish such claim and to have the order for a mixed jury superseded, but revocation may be ordered on such an application in the discretion of the court. IBID.

402

**Mode of Trial**

See TRIAL.

**Motive***Murder—Life insurance.*

1. To prove the alleged motive of securing life insurance

**Motive—Continued.**

- moneys, in a trial for murder, evidence is properly admissible, as a part of the *res gesta* of all applications for insurance made practically at the same time and forming parts of one transaction, although some of the applications were refused and no insurance effected thereupon. *R. v. HAMMOND.* (ONT.) 373
2. Murder, similar insurance of others effected by accused. 5
3. For illegal conspiracy, nature of 261

**Multifarious Indictment.**

1. An indictment multifarious in that it combines a charge of a failure to provide necessaries for a child under sixteen under Cr. Code 210, 215 with a charge of an attempt to murder the child (Cr. Code 232) and to which indictment the prisoners pleaded is sufficient upon which to base a conviction thereon for the latter offence without a formal amendment of the indictment, where the presiding judge has withdrawn from the jury that portion of the charge based upon secs. 210 and 215. *R. v. LAPIERRE.* (QUE.) 413

**Municipal License**

See LICENSING LAW.

**Murder**

1. Administration of similar poison to another person as proving intent. I, 4
2. Attempt to commit, cruelty to child, evidence. 413
3. By committing an abortion. 246
4. Dying declaration as evidence. 351
5. Motive, life insurance. 373
6. Poisoning, proof of intent. 1

**Necessaries**

See NON-SUPPORT.

**New Brunswick**

- Liquor License Act (1887, c. 4), section 82. 126, 129, 153
99. 536
108. 536
110. 129, 534, 535
111. 536
117. 129, 153, 154
139. 129

**New Trial**

1. Failure of prisoner's wife to testify, comment by prosecuting counsel upon the. 457, 466
- Discovery of new evidence.*
2. A new trial granted by the Minister of Justice under Cr.

**New Trial—Continued.**

Code sec. 748, on the discovery of new evidence. R. v. STERNAMAN. (ONT.) 1

*Judge's charge—Ambiguity in.*

3. A new trial should be ordered, if the judge's charge was so ambiguous that the jury may have been misled into thinking that a material issue of fact was withdrawn from their consideration as being a matter of law. R. v. COLLINS. (N.B.) 48

**Non-judicial acts**

No review of by certiorari. 22

**Non-support**

1. Failure to provide necessities, Note as to lawful excuse. 30

*Of wife—Lawful excuse.*

2. Upon a prosecution under the Criminal Code, 1892, sec. 210(2) for omitting without lawful excuse to provide necessities for a wife, evidence is admissible, as tending to show a lawful excuse, of an agreement between husband and wife at time of marriage that she should be supported as before the marriage and not by him until he could earn sufficient means for the maintenance of both, and such evidence is admissible although it may not, if established, furnish an answer to the charge. R. v. ROBINSON. (ONT.) 28

**Northwest Territories**

1. Liquor License Ordinance, 1891-92, section 69. 134
  85. 134
  86. 134
  105. 133
  106. 133
  112. 134
  120. 133
2. The Municipal Ordinance (Rev. Ord., c. 8), section 68, ss. 31. 371

**Noscitur a sociis**

1. The meaning of the words "disorderly house" in Cr. Code, sec. 783 (f) and sec. 784, is governed by the rule noscitur a sociis, and is therefore restricted to houses of the nature and kind of a house of ill-fame or bawdy house. R. v. FRANCE. (QUE.) 321

**Notice***Motion for certiorari.*

1. The Imperial Statute 13 Geo. II. c. 8, s. 5, is in force in British Columbia as well as in Ontario, and six days previous notice of the motion for a certiorari must be given to the justices; and a rule nisi for a certiorari made returnable six days or more after



**Notice—Continued.**

- service thereof is not a sufficient compliance with the statute.  
**RE PLUNKETT.** (B.C.) 365
2. Statutory notice of application for certiorari is a condition precedent. 368
  3. Waiver of statutory notice. 368

**Nova Scotia**

1. Revised Statutes N.S. 3rd series c. 159, section 2. 424, 425, 431
2. Revised Statutes, 3rd series c. 162, section 12. 10
3. Revised Statutes, 5th series c. 103, section 2. 10
- “ “ “ sections 28-29. 11
4. “ “ “ c. 117. 539
5. Statutes 1889, c. 5. 426
6. Statutes 1889, c. 11, sec. 1. 545, 546
7. Statutes 1889, c. 36. 11
8. Statutes 1889, c. 57. 431
9. Statutes 1891, c. 32. 424, 425, 426, 431, 432

**Oath of Office**

See **DISQUALIFICATION.**

**Objection***Grounds of—Certiorari practice.*

1. Objections on account of any omission or mistake in a conviction made by a magistrate must be set forth in the rule nisi in certiorari proceedings, or the same will not be allowed. **R. v. BEALE.** (MAN.) 235
2. To irregularity in mode of trial, failure to make. 466
3. To jurisdiction of de facto magistrate who has failed to take oath of office. 528
4. To want of statutory notice, waiver of. 368
5. To want of statutory notice for certiorari, when open on subsequent proceedings. 368

**Offence***Description of.*

1. The statement of the offence in an information or indictment may be in the words of the enactment describing it or declaring the transactions charged to be an indictable offence. **R. v. FRANCE.** (QUE.) 321

*Exception in statutory description.*

2. The existence of an exception nominated in the description of an offence created by statute must be negatived in order to maintain the charge. **R. v. STRAUSS.** (B.C.) 103

**Officer**

See **CROWN OFFICER.**  
 See **DE FACTO JUDGE.**  
 See **DE FACTO OFFICER.**

**Ontario**

1. Companies Act, R.S.O., 1897, c. 191, section 43 (4). 562
2. County Judge's Criminal Court in. 452, 455
3. Habeas Corpus Act, R.S.O., 1897, c. 83. 455
4. Liquor License Act, R.S.O., 1897, c. 245. See LIQUOR LICENSE.
5. Lord's Day Act, R.S.O., 1897, c. 246. 46
6. Medical Act, R.S.O., 1897, c. 176, section 49. 14, 114
7. "Weekly Court" in High Court of Justice. 405

**Onus***Description of offence—Exception in.*

1. If a statute creates an offence in general terms with an exception by way of proviso in favour of certain persons or circumstances, the onus is on the accused to plead and prove himself within the proviso. R. v. STRAUSS. (B.C.) 103
2. Of proving want of reasonable and probable cause. 48

*Trade mark prosecution.*

3. On a charge of falsely applying a trade mark the onus of proving that the assent of the proprietor of the trade mark has not been given is upon the prosecution. R. v. S. HOWARTH. (ONT.) 243

**Overt Act**

See CONSPIRACY.

**Parent**

1. Abduction of child against the will of, evidence of consent by conduct. 286
2. Abduction of child from custody of putative father. 287

*Possession of child.*

3. When the girl who was resident with her father in a foreign country left without his consent and with intent to renounce his protection, and came to Canada, the father's possession ceased, and, *semble*, a possession *de jure* afterwards established by his following her to the place of flight is not the possession contemplated by Cr. Code, sec. 283. R. v. BLYTHE. (B.C.) 263

**Particulars***Of charge.*

1. The absence or the insufficiency of particulars does not vitiate an indictment nor an information; but if it be made to appear that there is a reasonable necessity for more specific information, the court or magistrate may, on application of the accused person, order that further particulars be given, but such an order is altogether within the judicial discretion of the judge or magistrate. R. v. FRANCE. (QUE.) 321
2. May be ordered of charge of "conspiracy by fraudulent means." 216
3. Of indictment, effect of as an amendment. 48

**Parties***Conspiracy charge.*

1. One conspirator may be indicted and convicted of conspiracy without joining the others, although living and within the jurisdiction. *R. v. FRAWLEY.* (ONT.) 253

*Prosecutor.*

2. Any person may institute proceedings in respect of an infraction of a municipal by-law, although the whole penalty goes to the municipal corporation. *R. v. CHIPMAN.* (B.C.) 81

**Pecuniary Interest**

See DISQUALIFICATION.

**Penalty***Cr. Code 208.*

1. Cr. Code, sec. 208, only applies to authorize six months' imprisonment when imposed as the substantive punishment for the offence of keeping a bawdy house and not as a means of enforcing payment of a fine. *R. v. STAFFORD.* (N.S.) 239

*Cr. Code 788.*

2. Semble, sec. 788, Cr. Code, only applies to authorize six months' imprisonment in default of payment of a fine when fine and imprisonment are conjointly imposed in the first instance. *IBID.* 239
3. Greater than authorized, effect of. 59, 126

*Imprisonment.*

4. The word "penalty," although generally applied to pecuniary punishment, as by fine, includes also punishment by imprisonment. *R. v. GAVIN.* (N.S.) 59

**Penetentiary Act**

*R.S.C., 1886, c. 182, section 42.* 542

**Persuasion**

See ABDUCTION.

**Pharmacy**

Practice of. 14

**Physician**

1. Duty of, on post-mortem examination. 252
2. Practice as, by unqualified person. 14, 114

**Plea***Election of mode of trial.*

1. If the accused, after electing in favor of a speedy trial, his right to which is disputed by the Crown, takes no further steps to obtain that right and is then indicted at the next court of Oyer

**Plea—Continued.**

and Terminer, his plea to such indictment will conclude him as to the mode of trial, and he cannot afterwards elect for a speedy trial without a jury under Cr. Code, sec. 765. R. v. LAWRENCE. (B.C.) 295

**Inadvertent plea.**

2. Consent given by the Crown to the withdrawal of plea to the indictment, upon a statement by counsel for the accused that the plea was made inadvertently. R. v. LAWRENCE. (B.C.) 295

**Irregularity.**

3. A plea irregular and illegal as containing matters of mere comment and argument should be rejected from the record, or the illegal averment should be struck out and the defendant allowed to plead anew. R. v. GRENIER. (QUE.) 55

**Poisoning****Proof of intent.**

1. Evidence is admissible on a charge of murder by poisoning to show the administration of the same kind of poison by the prisoner to another person, as proving intent. R. v. STERNAMAN. (ONT.) 1
2. Evidence of similar symptoms of arsenical poisoning attending the death of prisoner's former husband following administration to him of food prepared by the prisoner is evidence to show intent as regards a charge of arsenical poisoning of a second husband on evidence of arsenical poison of the latter and of similar preparation of food by the prisoner for, and her attendance on her second husband during his illness. IBID. 1

**Police Magistrate****Mandamus to.**

1. A police magistrate will not be compelled by mandamus to take a recognizance for the prosecution of an appeal from a summary conviction made on a trial before him had with the consent of the accused, where no appeal lies. R. v. EGAN. (MAN.) 112

**Powers in cases of theft.**

2. Theft from the person is an indictable offence under Criminal Code, sec. 344, although the amount is less than \$10, and although the case might therefore have been summarily tried by a magistrate without the prisoner's consent; and if in such case the prisoner consents to be tried by a *police* magistrate having the extended powers of a Court of General Sessions where such consent is given, he is liable to sentence for the more onerous punishment which the General Sessions might impose in excess of the powers of an ordinary magistrate. R. v. CONLIN. (ONT.) 41

**Police Magistrate—Continued.***Trial of charge against.*

3. Notwithstanding a statute that no Justice of the Peace shall act as such for a city except in the case of illness or absence or at the request of the Police Magistrate, a Justice of the Peace may act as regards a charge against such Police Magistrate without the latter's request or his illness or absence. *R. v. CHIPMAN.* (B.C.) 81

**Police Officer**

- Admissions on interrogation by, as evidence. 398

**Political Offence**

See EXTRADITION.

**Possession**

See ABDUCTION.

See GAME PROTECTION.

**Post-mortem examination**

- Sufficiency of. 246, 252

**Practising medicine***Apothecary.*

1. The statutory right to practice as an "apothecary" does not authorize the practising of medicine. *R. v. HOWARTH.* (ONT.) 14

*Diagnosing case.*

2. A druggist is liable under R.S.O. 1897, c. 176; R.S.O. 1887, c. 148; for practising medicine without license if he assumes to discover the nature of the disease by enquiry from the purchaser as to the symptoms and advises the remedy he supplies. *IBID.* 14

3. If the purchaser tells a druggist his complaint, taking upon himself the determination of the symptoms, the druggist may legally inform him what remedies he has and advise as to the best remedy without becoming liable for practising medicine without authority. *IBID.* 14

*For gain.*

4. The fact that no additional charge was made above the ordinary price of the remedy does not make the transaction any the less a practising for gain, nor lead to the inference that the consideration should apply wholly to the price of the medicine, and not to the advice given in diagnosing the disease. *IBID.* 14
5. Meaning of. 14, 22

*Particulars in conviction.*

6. A conviction for unlawfully practising 'medicine without being registered under The Ontario Medical Act is bad, unless it specifies the particular acts constituting the alleged "practising." *R. v. COULSON.* (ONT.) 114

**Preliminary inquiry**

See AMENDMENT.

See DEPOSITIONS.

See HOLIDAY.

See SUNDAY.

**Presumptions**

1. As to depositions certified from proper custody. 161
2. As to persons acting in public capacity. 315
3. Commitment presumed prima facie to correctly recite conviction. 220
4. From acts of officer "de facto" with acquiescence. 315
5. Sentences passed at the one time not presumed to be concurrent. 118

**Previous Conviction**

See AMENDMENT.

*Answering charge of*

1. Under the Liquor License Act (Manitoba), which provides that upon a prosecution for a second offence thereunder the accused shall, if found guilty and not before, be asked to admit or deny the previous conviction charged, and also provides that proof of the previous conviction may be made by a certificate of the convicting magistrate in case of denial or failure to answer, the accused must be given an opportunity of meeting the charge of prior conviction. *R. v. HERRELL.* (MAN.) 510
2. Evidence of. 13, 513, 514

*Proof of identity.*

3. In the absence of an admission by the accused of the fact of previous conviction, it is essential under the Manitoba Liquor License Act that evidence apart from such certificate should be given of the identity of the accused with the person formerly convicted; and the magistrate can act only upon evidence adduced and not upon his own personal knowledge as to such identity. *R. v. HERRELL.* (MAN.) 510

**Privilege**

1. Claim of by witness in civil case as affecting use of evidence in subsequent criminal proceedings. 487, 501
2. Of witness, as to incriminating questions. 221, 373, 397

*Witness—Incriminating questions.*

3. The excuse from answering questions which may tend to criminate himself is only removed by the Canada Evidence Act, secs. 2 and 5, where the witness is being examined in a criminal proceeding or in some civil proceeding or matter respecting which the Dominion Parliament has authority to determine the admissibility of the evidence. *R. v. DOUGLAS.* (MAN.) 221

**Prize-fight**

Illegality of.

450

**Protection**

Order of, on quashing conviction.

10, 47, 117, 372

**Provincial legislation**

See CONSTITUTIONAL LAW.

**"Purporting"***Meaning of—Counterfeiting.*

1. A paper which is a spurious imitation of a government treasury note is a counterfeit, or what *purports* to be a counterfeit token of value under Cr. Code, sec. 479, although there is no original of its description. R. v. COREY. (N.B.) 161

**"Procuring"***Meaning of—Carrying firearms.*

1. A conviction for "procuring" a pistol with intent unlawfully to do injury to another person, is not to be held a sufficient conviction for "having on his person a pistol, etc.," and is bad as not disclosing an offence known to the law. R. v. MINES. (ONT.) 217

**Property and Civil Rights**

See CONSTITUTIONAL LAW.

**Prosecutor**

See PARTIES.

**Prostitution***Interpretation—Cr. Code 207 (1).*

1. A woman who is kept by a married man and who surrenders herself to sexual intercourse with him alone, does not come under the purview of Cr. Code 207 (1), which declares any one to be a vagrant who, having no peaceful profession or calling to maintain herself by, for the most part supports herself by the avails of prostitution. R. v. REHE. (QUE.) 63

**Qualification**

See DISQUALIFICATION.

**Quashing conviction**

See CERTIORARI.

See COSTS.

**Quebec**

See MIXED JURY.

1. Habeas Corpus Act, C.S.L.C., c. 95. 169, 170
2. Montreal Charter Amendment, 59 Vict., c. 46, section 6. 120
3. Revised Statutes of Quebec, article 603 (Oaths of Office). 530

**Reasonable Doubt**

Facts to be found beyond.

278

**Reasonable and Probable Cause***Demand with menaces.*

1. On a charge of delivering a letter demanding property with menaces and without reasonable and probable cause (Code, sec. 403), the question as to whether the demand was made without reasonable and probable cause is one of fact. *R. v. COLLINS.* (N.B.) 48
2. The onus of proof is upon the prosecution to prove a want of reasonable and probable cause, in a charge of demanding property with menaces. *IBID.* 48

**Recognizance**

See COSTS.

*On appeal—Consent to summary trial.*

1. A police magistrate will not be compelled by mandamus to take a recognizance an appeal from a summary conviction made on a trial before him had with the consent of the accused, where no appeal lies. *R. v. EGAN.* (MAN.) 112

**Re-election***Mode of trial—Cr. Code 766, 767.*

1. A prisoner arraigned before a County Judge under Criminal Code, secs. 766 and 767, and who thereupon demands a trial by jury and elects not to be tried forthwith by such judge without a jury, has no absolute right after remand to go to change the election so made. *R. v. BALLARD.* (ONT.) 96
2. The sheriff having once given the notice to the judge and brought the prisoner before him, as provided by the Code, sec. 766, is not bound to again do so on notice given by the prisoner that the latter desired to re-elect in favor of a speedy trial. *IBID.* 96

**Referred case**

1. Decision upon by Court under Government reference, advisory only. 203, 205
2. Jurisdiction of Supreme Court of Canada on case referred by Governor-General in Council. 172, 203

**Reply, right of***Joint Indictment.*

1. On a joint indictment for one offence, when the evidence for the one would inure to the benefit of the other, the right to a general reply is with the prosecution, though only one defendant called witnesses in defence. *R. v. CONNOLLY.* (ONT.) 468



**Resemblance**

See IDENTITY.

See TRADE MARK.

**Reserved case***Addresses of counsel.*

1. The question as to the order of addresses to the jury by counsel at the close of the evidence is not a question of law proper to be reserved for the opinion of a Court of Appeal under Cr. Code, sec. 743. R. v. CONNOLLY. (ONT.) 468
2. Applies to questions arising *on* not *before* the trial. 456
3. No writ of error if reserved case could be granted. 456

*Trial without jury—Findings.*

4. Where the trial takes place by consent without a jury the finding by the trial judge of an intent to steal should not be interfered with unless there is no evidence thereon which could properly be submitted to a jury. R. v. GIBBONS. (MAN.) 340

**Res Gestæ**

See EVIDENCE.

**Res Judicata**

- Decision of superior court on question of jurisdiction. 546

**Restaurants**

See LIQUOR LICENSE.

**Return***Controverting.*

1. Where the warrant of arrest embodied in the return to a habeas corpus on its face shews jurisdiction in the magistrate affidavits are not admissible to controvert such fact if the offence charged be a criminal one. R. v. DEFRIES. (ONT.) 207
2. Of amended conviction on habeas corpus. 217, 219

*Proof of extrinsic fact.*

3. Proof by affidavit is admissible in habeas corpus proceedings to show that the commitment took place on a Sunday, as proving an extrinsic fact in confession and avoidance of, but not contradicting, the return. R. v. CAVELIER, (MAN.) 134
4. To certiorari, of fresh warrant of commitment. 365
5. To habeas corpus, controverting. 140, 207
6. To habeas corpus, by jailer, form. 540

**Review of findings**

See CERTIORARI.

See HABEAS CORPUS.

**Second Offence**

1. Absence of evidence of previous conviction. 514

*After information for first.*

2. A conviction for a second offence under the Canada Temperance Act must show that the second offence was committed after the information had been laid for the first offence. *EX PARTE LE BLANC.* (N.B.) 12

*Conviction—Amendment.*

3. A conviction for a second offence which is defective for want of proof of any prior conviction should not be amended under Cr. Code, secs. 209, 210, so as to impose the lesser penalty applicable to a first offence, unless the court is satisfied, from a perusal of the depositions and after giving the accused the benefit of any reasonable doubt, that an offence is thereby proved. *R. v. HERRELL.* (MAN.) 510

*Identity of person.*

4. In the absence of an admission by the accused of the fact of previous conviction, it is essential under the Manitoba Liquor License Act that evidence apart from a certificate should be given of the identity of the accused with the person formerly convicted. *IBID.* 510

*Liquor License—Denial of prior conviction.*

5. Under the Liquor License Act (Man.), which provides that upon a prosecution for a second offence thereunder the accused shall, if found guilty and not before, be asked to admit or deny the previous conviction charged, and which also provides that proof of the previous conviction may be made by a certificate of the convicting magistrate in case of denial or failure to answer, the accused must be given an opportunity of meeting the charge of prior conviction. *IBID.* 510

**Security for Costs**

See *RECOGNIZANCE.*

By private prosecutor, discretion to order on certain indictments. 151

**Seduction***Corroboration—Cr. Code 684.*

1. The corroborative evidence "implicating" the accused which is made necessary by Criminal Code, sec. 684, to sustain a charge of seduction of a girl under sixteen, may consist of the prisoner's admission made after she had attained sixteen that he had had connection with her. *R. v. WYSE.* (N.W.T.) 6
2. A statement made by the accused before he was charged with the offence that he had been advised that if he could get

**Seduction—Continued.**

the girl to marry him he would escape "punishment," is corroborative evidence "implicating" the accused and proper to be considered by a jury or by a judge exercising the functions of a jury. IBID.

6

**Sentence***Concurrent sentences.*

1. There is no presumption that sentences passed at the one time are to be concurrent. EX PARTE BISHOP. (N.B.) 118

*County Judges Criminal Court.*

2. Where sentence has been passed by a Court having general jurisdiction of the case such as the County Judge's Criminal Court has in cases of theft, and the prisoner is detained in custody thereunder, the authority of the Court to pass the sentence need not be set out by the jailer upon the return to a writ of habeas corpus. R. v. BURKE. (N.S.) 539
3. No habeas corpus to set aside erroneous sentence of Court of competent jurisdiction. 544

**Shall**

Construction of, in statute. 442, 451

**Sheriff***Notice of prisoner's committal.*

1. A sheriff having once given the notice to the judge that a prisoner has been committed to jail for trial and having brought the prisoner before the judge for arraignment, as provided by Cr. Code, secs. 766 and 767, is not bound to again do so on notice given by the prisoner that the latter desired to re-elect in favor of a speedy trial. R. v. BALLARD. (ONT.) 96

**Shorthand**

Notes of evidence at preliminary enquiry, affidavit that a "true report" to accompany. 160

**Single Judge**

See JURISDICTION.

**Special Case**

Reference of, by Governor-General in Council. 172, 203

**Special Circumstances**

When necessary to shew, for certiorari. 153, 154

**Specific Words**

Effect of, on generic words following. 109, 112, 321

**Speedy Trial***Admission to bail.*

1. The admission to bail under Cr. Code, sec. 601, does not deprive the accused of the right to a speedy trial under Cr. Code, sec. 765. *R. v. LAWRENCE.* (B.C.) 295

*Change of election for.*

2. A prisoner who has elected for a jury trial has no further option to elect in favor of a speedy trial, although the election made by him was made under mistake. *R. v. BALLARD.* (ONT.) 96

*Findings of fact—Review.*

3. Where the trial takes place by consent without a jury the finding by the trial judge of an intent to steal should not be interfered with unless there is no evidence thereon which could properly be submitted to a jury. *R. v. GIBBONS.* (MAN.) 340

*Waiver—Plea in jury court.*

4. If the accused, after electing in favor of a speedy trial, his right to which is disputed by the Crown, takes no further steps to obtain that right and is then indicted at the next jury court his plea to such indictment will conclude him as to the mode of trial, and he cannot afterwards elect for a speedy trial without a jury under Cr. Code, sec. 765. *R. v. LAWRENCE.* (B.C.) 295

**Stated Case**

- By magistrate, when remitted. 108

**Statutes**

See CONSTRUCTION OF STATUTE.

1. Dominion, see under respective titles.
2. Provincial, see under name of province.

**Stealing**

See THEFT.

**Street railway**

- Operation of on Sunday contrary to provincial statute. 424

**Substitution**

See AMENDMENT.

**Summary trial**

See ASSAULT.

See TRIAL.

**Summons**

- Improper for inconvenient place of return. 81

## Sunday

See SUNDAY OBSERVANCE.

*Judicial proceedings on—Cr. Code 729.*

1. The conduct of a preliminary inquiry before a magistrate is a judicial proceeding which cannot be legally done on Sunday, notwithstanding Cr. Code, sec. 729. *R. v. CAVELIER. (MAN.)* 134
2. Sec. 729 Cr. Code authorizing the "taking of the verdict of the jury or other proceedings of the court" on a Sunday is to be applied only to matters before a jury. *IBID.* 134
3. Writ returnable on, is a nullity. 453

## Sunday Observance

*By-law—Reasonableness.*

1. A municipal by-law as to Sunday observance which exceeds in its prohibition the terms of the provincial law by including classes of persons not included by the latter is too wide in its scope, and is void for unreasonableness. *R. v. PETERSKY. (B.C.)* 91

*Cab-driving—Lord's Day Act (Ont.)*

2. Cab-driving on Sunday is not an offence by the cab-driver under the Lord's Day Act of Ontario (R.S.O. 1897, c. 246; R.S.O. 1887, c. 203.) *R. v. SOMERS. (ONT.)* 46

*Conviction—Uncertainty.*

3. A conviction for doing worldly labour on Sunday contrary to the Lord's Day Act (Ont.) is void for uncertainty unless the acts constituting the offence are specified. *R. v. SOMERS. (ONT.)* 46
4. Provincial Criminal law before confederation of the provinces, ultra vires amendments. 424
5. Reasonableness of by-law. 91

## Superior Court

Distinction between superior and inferior courts as regards habeas corpus. 546

## Tariff

See COSTS.

## Temperance Society

1. Attendance of members at trial to influence prosecution. 517
2. Membership of magistrate in, as affecting his qualification to act. 517

## Taxation

See COSTS.

## Tenders

Apparently completing tenders under one control as evidence of conspiracy. 488

## Territorial Limits

See EXTRA-TERRITORIAL ACTS.

See LOCALITY OF CRIME.

**Theft***Amount under \$10—Indictment.*

1. Theft from the person is an indictable offence under Cr. Code, sec. 344, although the amount is less than \$10, and although the case might therefore have been summarily tried by a magistrate without the prisoner's consent. R. v. CONLIN.

(ONT.) 41

*Amount under \$10—Summary trial.*

2. If in such case the prisoner consents to be tried by a *police* magistrate having the extended powers of a Court of General Sessions where such consent is given, he is liable to sentence for the more onerous punishment which the General Sessions might impose in excess of the powers of an ordinary magistrate. IBID.

41

*Cr. Code 783—Interpretation.*

3. The word "theft" in Criminal Code, sec. 783, covers the offence of "stealing from the person." IBID.

41

4. Demand with menaces, and with intent to steal. 340, 350

5. Right of appeal in cases of theft under \$10 in British Columbia, where summary trial by two justices under Cr. Code 784 (3).

231

*Summary trial with consent.*

6. An appeal does not lie from the decision of a police magistrate who tries a charge of theft summarily with the consent of the accused. R. v. EGAN.

(MAN.) 112

**Threats**

See MENACES.

**Tokens**

Counterfeit, offence of selling.

161

**Trade-Mark**

1. Assent of proprietor, onus of proof.

73, 243

2. At common law.

73

*English decisions on—Reference to.*

3. The Canadian law respecting trade-marks being derived from English legislation, reference for its interpretation should be had to English decisions, more especially as the law extends throughout the Dominion, and it is desirable that the jurisprudence should be uniform. R. v. AUTHIER.

(QUE.) 68

*Falsely applying—Proprietor's assent—Onus.*

4. On a charge of falsely applying a trade-mark the onus of proving that the assent of the proprietor of the trade-mark has not been given is upon the prosecution. R. v. S. HOWARTH.

(ONT.) 243

5. Cr. Code sec. 710 applies only to cases of forgery of a trade-

**Trade-Mark—Continued.**

mark and not to cases of "falsely applying" to shift the onus to the defendant to proving such assent. *IBID.* 243

*Forgery of—Cr. Code 448.*

6. Where a trade-mark is complained of as being forged and as infringing the rights of the proprietor of a duly registered trade-mark, any resemblance of a nature to mislead an incautious or unwary purchaser, or calculated to lead persons to believe that the goods marked are the manufacture of some person other than the actual manufacturer, is sufficient to bring the person using such trade-mark under the purview of article 448 of the Criminal Code, which prohibits the sale of goods falsely marked. *R. v. AUTHIER.* (QUE.) 68

7. Resemblance "calculated to deceive." 68, 245

**Traders**

See LICENSE LAW.

**Transient Traders**

See LICENSE LAW.

**Translation**

Recording depositions after translation. 157

**Trial**

1. By police magistrate with consent. 41, 112, 113

2. Comment on failure to testify. See COMMENT.

3. Committal to gaol for, meaning of. 295

4. In absence of accused. See ABSENCE.

*Inconvenient place of.*

5. The fixing of an inconvenient place for hearing is improper but within the jurisdiction of the Justice of the Peace, and therefore not reviewable on motion for prohibition. *R. v. CHIPMAN.* (B.C.) 81

6. Irregularity in proceedings, consent of prisoner. 465

*Keeping disorderly house—Cr. Code 783 (f).*

7. Cr. Code, sec. 783 (f), enacting that whenever any person is charged before a magistrate with keeping or being an inmate or habitual frequenter of any disorderly house, house of ill-fame or bawdy house, the magistrate may hear and determine the charge in a summary way, does not apply to the offence of keeping a common gaming house. *R. v. FRANCE.* (QUE.) 321

8. Mode of, see ELECTION.

*Preliminary enquiry—Jurisdiction.*

9. Magistrates conducting a preliminary enquiry in respect of an indictable offence, may not on its conclusion convict of a lesser offence, over which they have summary jurisdiction, although proved by the evidence adduced, if no complaint was

**Trial—Continued.**

laid before them, nor the accused called upon to defend in respect of such lesser offence. *R. v. MINES.* (ONT.) 217

*Summary trial with consent—Appeal.*

10. Cr. Code, sec. 808, prevents the application of any of the provisions as to appeals from summary convictions, (secs. 879-884,) to convictions under Part LV., (secs. 782-808,) by a police magistrate on a summary trial with the consent of the accused. *R. v. EGAN.* (MAN.) 112

*Waiver of trial without jury.*

11. If the accused, after electing in favor of a speedy trial, his right to which is disputed by the Crown, takes no further steps to obtain that right and is then indicted at the next court of Oyer and Terminer, his plea to such indictment will conclude him as to the mode of trial, and he cannot afterwards elect for a speedy trial without a jury under Cr. Code, sec. 765. *R. v. LAWRENCE.* (B.C.) 295

**Unauthorized Penalty**

See PENALTY.

**Uncertainty***Amendment on certiorari.*

1. A conviction bad on its face for uncertainty should be amended by the Court to which removed by certiorari, only when such Court can conclude on the evidence that an offence is thereby proved. *R. v. COULSON.* (ONT.) 114

*In summary conviction—Description of offence.*

2. A conviction for doing worldly labour on Sunday contrary to the Lord's Day Act is void for uncertainty unless the acts constituting the offence are specified. *R. v. SOMERS.* (ONT.) 46

*Practising medicine—Particulars.*

3. A conviction for unlawfully practising medicine without being registered under The Ontario Medical Act is bad for uncertainty unless it specifies the particular acts constituting the alleged "practising." *R. v. COULSON.* (ONT.) 114

**Undertaking**

Of counsel to produce original books, effect of to admit secondary evidence on default. 487, 500

**Unlawful**

Meaning of. 488, 489, 501

**Unreasonableness**

By law void for. 91

**Ultra vires**

SEE CONSTITUTIONAL LAW.



## Vagrancy

### *Prostitution as evidencing.*

1. A woman who is kept by a married man and who surrenders herself to sexual intercourse with him alone, does not come under the purview of Cr. Code 207 (1), which declares any one to be a vagrant who, having no peaceful profession or calling to maintain herself by, for the most part supports herself by the avails of prostitution. *R. v. REHE.* (Q'U.E.) 63

## Venue

### *In Conspiracy Case.*

1. The venue in an indictment for conspiracy may be laid either where the agreement was entered into or where any overt act was done in pursuance of the common design. *R. v. CONNOLLY.* (ONT.) 468
2. Insufficient laying of, in indictment. 548

## Verdict

- Permissible to take on a Sunday. 140

## Voluntary statements

See EVIDENCE.

## Waiver

### *Improper comment—Can. Evidence Act, s. 4 (2).*

1. Objection to comment by the prosecuting counsel upon the failure of the prisoner's wife to testify, is not waived because not taken at the time, and it is sufficient if drawn to the attention of the trial judge after the jury have retired to deliberate. *R. v. CORBY.* (N.S.) 457
2. Of civil remedy by criminal proceedings for assault. 440

### *Plea after illegal commitment.*

3. If after commitment for trial illegally made by a magistrate on a statutory holiday, the accused elects to be tried at the County Judge's Criminal Court and pleads there to the charge and is convicted, the conviction is not invalidated because of the invalidity of the commitment for trial. *R. v. MURRAY.* (ONT.) 452

## Warrant

1. Of arrest or commitment, order for further detention and proceedings not to be made in another province than that in which warrant issues. 207
2. Of commitment by County Judge's Criminal Court, form of. 540
3. Quashing warrant of commitment. 120

### *Substitution of new warrant.*

4. The justices may return an amended or fresh warrant of com-

**Warrant—Continued.**

mitment with the writ of certiorari and if it be sufficient the court will not enquire into the validity of a previous warrant upon which the prisoner was held, which was bad for not following the conviction or disclosing any offence; but costs were refused to the justices as against the defendant in such case as the application was justifiable at the time it was launched. *Re PLUNKETT.* (B.C.) 365

**Weekly Court**

In Ontario, jurisdiction of. 405

**Withdrawal**

*Of comment—Canada Evidence Act s. 4 (2).*

1. The rule entitling a prisoner to a new trial because of comment before the jury on the failure of the prisoner's wife to testify is to be applied, notwithstanding a subsequent withdrawal of the comment and notwithstanding the judge's direction to the jury to disregard it. *R. v. CORBY.* (N.S.) 457

*Of inadvertent plea.*

2. Consent given by the Crown to the withdrawal of plea to the indictment, upon a statement by counsel for the accused that the plea was made inadvertently. *R. v. LAWRENCE.* (B.C.) 295

**Witness**

*Application of Can. Evidence Act, secs. 2, 5.*

1. The excuse from answering questions which may tend to criminate himself is only removed by the Canada Evidence Act, secs. 2 and 5, where the witness is being examined in a criminal proceeding, or in some civil proceeding or matter respecting which the Dominion Parliament has authority to determine the admissibility of the evidence. *R. v. DOUGLAS.* (MAN.) 221

2. Certificate for protection of witness giving incriminating answers under Controverted Elections Act (Can). 389

3. Claim of privilege by, in civil case, as affecting subsequent criminal proceedings. 487, 501

*Failure to claim privilege.*

4. If a party entitled in civil proceedings to be excused from answering questions on the ground that the answers might tend to criminate him does not object to answer, his evidence is deemed to be voluntary. *R. v. DOUGLAS.* (MAN.) 221

5. Former deposition of, admissibility to contradict testimony. 157

*Incriminating questions—Compulsory evidence.*

6. A witness before a Coroner's Court is compelled under the Canada Evidence Act to answer incriminating questions, such court being a criminal court and a court of record, and pro-

**Witness—Continued.**

- ceedings before the coroner are within the jurisdiction of the Federal Parliament, although no one is there charged with the offence of causing the death of the deceased. *R. v. HAMMOND.* (ONT.) 373
7. A witness at a Coroner's inquest, who is sent for by the Coroner and returns with the constable, acting as the Coroner's messenger, and who is bound in law to answer incriminating questions whether or not he objects, is none the less giving evidence under compulsion because he expresses before the Coroner a wish to give his evidence, and such evidence is not a voluntary confession or admission. *IBID.* 373
8. Protection of against incriminating questions, where privilege claimed. 397

**Wife**

See HUSBAND AND WIFE.

**Words and Phrases**

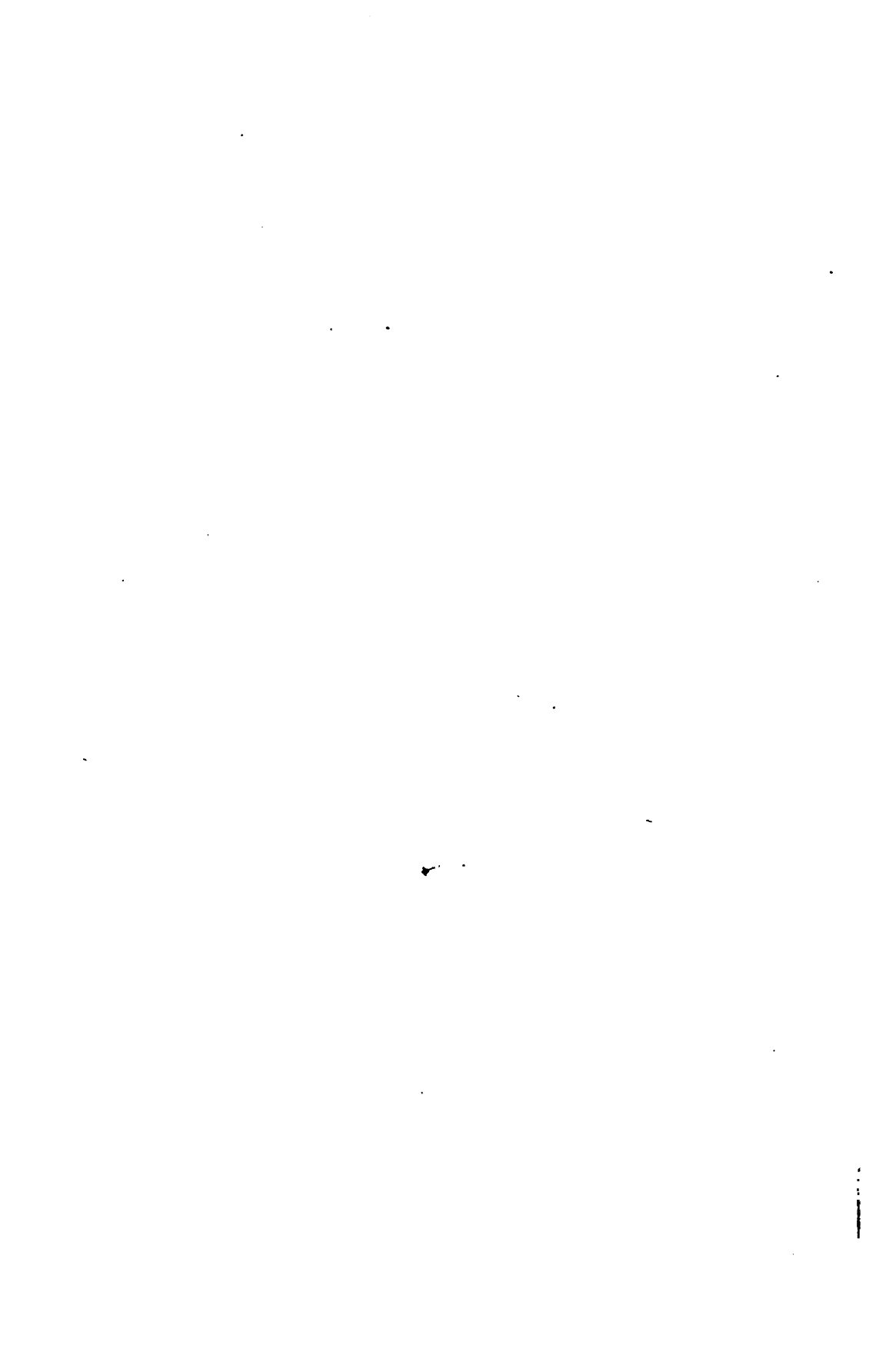
"Against the will of."	286
"Carrying on business."	370
"Committed to gaol for trial."	295
"Counterfeit."	161
"Evidence implicating."	6
"Excused."	381
"Foregoing."	152
"Lawful excuse."	28, 30
"Meals."	317
"Other."	109, 112, 321
"Penalty."	59
"Practising medicine."	14, 22, 114
"Procuring a pistol."	217
"Question of law."	468
"Sale or other disposal."	109, 319, 320
"Shall."	442
"Traders."	339
"Unlawful."	488, 489, 501
"Wheresoever."	179, 196
"Wholesale merchant or trader."	337
"Whosoever."	179, 196

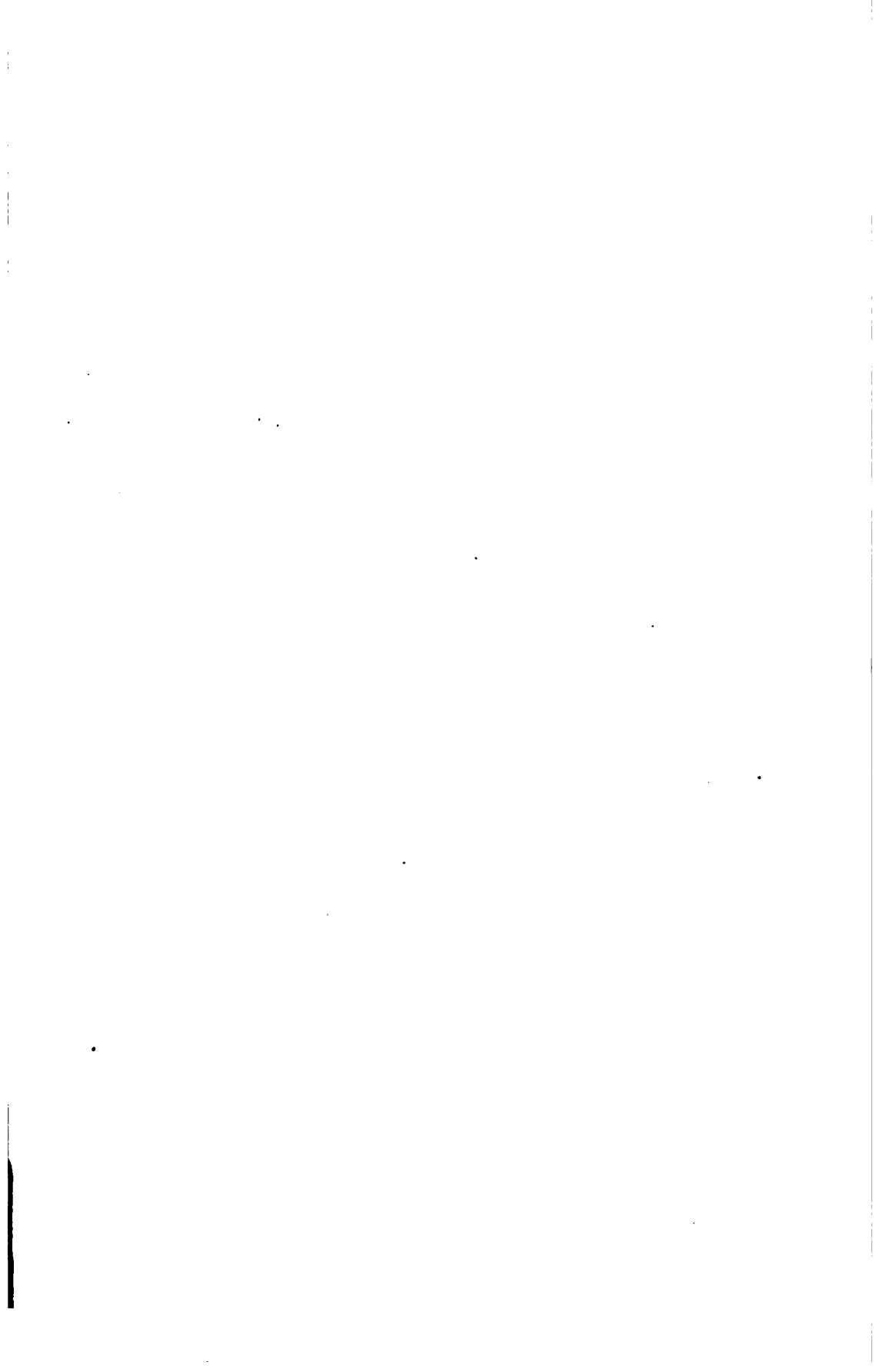
**Writ of Error***Court of Record.*

1. Proceedings of a court of record can be reviewed only upon a writ of error. *R. v. MURRAY.* (ONT.) 452
2. Dispensing with attendance of plaintiff upon. 456
3. When proper mode for obtaining review. 455, 456









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